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N. 2992

No. 14,509
United States Court of Appeals
For the Ninth Circuit

CHARLES H. MARTIN,

Appellant,

VS.

BE-GE MFG. Co., of Gilroy, a corporation,
and ALBERT G. GURRIES,

Appellees.

BRIEF ON BEHALF OF APPELLEES.

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Appellees.

BRIEF ON BEHALF OF APPELLEES.

STATEMENT OF THE CASE.

The plaintiff-appellant, Charles H. Martin, hereinafter called "Martin", brought this action for infringement of claims 10 and 11 of United States Letters Patent No. 2,014,479 which was granted to him on September 17, 1935 for a "Land Leveler". As shown in the Martin patent, Exhibit 6, the Martin device consists of a scraper which is pivotally connected to a frame which, in turn, is connected to a tractor. When the scraper is drawn over the surface of the ground in digging or loading position, it is unsupported by its wheels. As the device fills, the earth allegedly engages the overhanging lip 21a (shown

in Figure 4 of the Martin patent) and the inventor claims that the upward pressure of the earth against the lip 21a limits further digging and actually lifts the scraper.

The allegedly infringing device was manufactured and sold by the appellee, Be-Ge Mfg. Co., of Gilroy, California, hereinafter called "Be-Ge". The other appellees are Albert G. Gurries, the president of Be-Ge Mfg. Co., and Sidney S. Johnson, an attorney in Gilroy, California, who was one of the incorporators and an early officer. The Be-Ge device consists of a scraper which is rigidly welded to the frame which is adapted to be connected to a tractor and drawn over the ground. The scraper is at all times supported by its wheels and the only force controlling the ground penetration and lifting of the scraper is the control exerted by the operator who controls the position of the scraper with respect to the wheels. There is a frame member across the back of the scraper and it is the appellant's contention that this frame is similar to his forwardly extending lip 21a. The appellees contend, and proved to the satisfaction of the trial judge that any dirt which engages this frame member does not exert sufficient pressure to be of any effect and, therefore, the function of the appellant's lip as specified in the appellant's claims 10 and 11, is not present in the Be-Ge device.

The case was tried before the Honorable Dal M. Lemmon in San Francisco and consumed three full trial days. Briefs were filed on behalf of both parties and Judge Lemmon, after having given due consider-

ation to the briefs, entered a Memorandum and Order on June 8, 1954 which stated in part:

“The Court is persuaded that the patent in question is not an inventive advance over the prior art and that the accused structure does not infringe.”

Findings of Fact and Conclusions of Law and a Judgment were entered by the learned trial judge, and it is from this Judgment that this appeal was taken. The Findings and Conclusions from which an appeal has been taken are set forth at appropriate places in this brief.

THE APPELLEES' POSITION.

It is the appellees' position that the Findings of Fact and Conclusions of Law are amply supported by the evidence and that the learned judge was correct in determining that the accused Be-Ge device does not infringe the Martin patent and that the Martin patent is invalid.

However, before embarking upon an analysis of the Findings of Fact and Conclusions of Law and the evidence which supports them, the appellees believe that an explanation of the patent in suit, its limitations, and the accused Be-Ge devices, is in order.

THE PATENT IN SUIT.

Introduction to the Land Leveling Art.

The art of handling and leveling earth reaches back into the early days of man and even today, man is confronted with the same problems of leveling the earth and making borders and ditches for irrigation. The prior art shows that the land leveling art is a well developed one.

For example, the patent to Scholder No. 1,341 (Exhibit E) dated September 25, 1839, illustrates a device which is provided with a scraper identified by the letter "A" which hangs on pivots so that it can be pivoted with respect to the frame into and out of digging position. When the member "A" is in such a position that its cutting edge engages the ground, earth will be scraped into it. When it is desired that the scraper be dumped, it may be rotated about the pivots "S" and the accumulated earth will simply fall out by gravity. The wheels "C" are controlled by a lever and are adapted to raise and lower the frame "H".

The art then advanced through devices of the type shown in Langdon Patent No. 54,373 dated May 1, 1866, and Wood Patent No. 265,295, dated October 3, 1882. These devices were small and crude, were adapted to be drawn by horses or oxen, and were usually made of wood strengthened by metal straps and braces; but they apparently worked.

The art then progressed through the years, as indicated by the book of prior art (Exhibit E) introduced by Be-Ge, until by the time Martin entered the

field there were so many different types of levelers and scrapers that, in all fairness, it must be said that the field in which the appellant labored was a well worked one. Moreover, a reading of Martin's patent and file wrapper, Exhibit D, reveals that Martin himself recognized this. Martin indicated that there were at least two types of scrapers and that his invention related to an improvement on only one of them, to-wit, that type in which the scraper "when in scraping positions, rests directly on the ground and is unsupported by the wheels—", (Pat. p. 1, c. 1, l. 23.)* To one unfamiliar with the art this would appear to be of little significance, but Martin went on to distinguish his device from another admittedly old and well known type classified in his patent, p. 1, c. 1, l. 12, where he stated:

"Heretofore the customary manner of mounting the scraper for such tilting movement has been to support it on wheels so arranged as to carry the scraper in all its scraping positions. That is to say, in the usual type of land leveler, the wheels ride on the ground, not only when the scraper is out of engagement with the ground, but when it is in scraping positions as well."

So in the Martin device, the wheels are *off* the ground and *do not* support the scraper during the scraping operation whereas "in the usual type of land leveler", the wheels are *on* the ground and *do* support the scraper during the scraping operation.

*Reference to the Martin Patent will be Pat. p., c., l., wherein "p." refers to page; "c." to column, and "l." to line.

This distinction is important. *This is so because the Martin scraper is of one type and the accused Be-Ge scraper is of another.*

The Court's attention is respectfully directed to Figures 1 and 2 of Appellee's Exhibit C wherein the above described difference is made clear. Figure 1 shows the Martin device and Figure 2 shows the prior art as exemplified in Hauser patent 1,759,982.

Figure 1 of defendant's Exhibit C illustrates the Martin structure. The draft frame is colored yellow. The scraper is colored purple, blue, red and green. The scraping edge and bottom part of the scraper is purple, the rear part of the scraper is blue and the red part is the forwardly extending lip. It will be noted that the scraper is tiltable with respect to the yellow draft frame. The black wheels engage the ground only when the scraper is in dumping position and then only for the purpose of spacing the cutting edge a predetermined distance from the ground so that the dirt which spills out of the scraper will be spread to a predetermined level. The depth to which the cutting edge digs is not determined by the wheels, since the Martin scraper, when in scraping position, engages the ground only with its cutting or scraping edge and is unsupported by the wheels. This is the type of device which the appellant defines as his.

The prior art Hauser structure is shown in Figure 2. The yellow frame is supported at its forward end by a draft vehicle or tractor. The draft frame is pivotally connected to an orange colored lever to one end of which there is secured a pair of black wheels.

By moving the lever about the yellow pivot at its center, the draft frame and cutting edge will be raised and lowered. The scraper is permanently secured to the draft frame and is not pivoted or tiltable with respect thereto. The draft vehicle or tractor and the black wheels on the scraper define a plane and the position of the purple cutting edge with respect to the plane is determined by raising and lowering the frame. This is the type of device which the plaintiff stated to be old when he states: "Heretofore the customary manner of mounting the scraper for such tilting movement has been to support it on wheels so arranged to carry the scraper in all its scraping positions. That is to say, in the usual type of land leveler, the wheels ride on the ground not only when the scraper is out of engagement with the ground but when it is in scraping positions as well." (Martin Pat. p. 1, c. 1, l. 12.)

Thus it will be seen that the Martin device belongs to one family of scrapers and the Hauser structure, for example, belongs to another family of scrapers.

It is Be-Ge's contention that its structure is classified with the Hauser type and not with the Martin type.

THE APPELLANT'S ALLEGED INVENTION.

An analysis of Martin's patent clearly supports our position.

We have shown that in his patent, Martin carefully and correctly locates his invention in the crowded

field in which he is working and characterizes it as belonging to a specific class. In addition, during the prosecution of his application and in order to distinguish over prior art devices, Martin made certain limiting arguments to convince the Patent Office that the claims should be granted to him (Exhibit D, p. 34, paper No. 5):

“Before taking up the claims individually, the characteristic differences of applicant’s device over the art will be described. With the exception of the patent to Throop, most of the references cited so far in the prosecution show devices belonging to the general *class of implements in which the scraper is carried at all times upon wheels*, regardless of whether the scraper is in loading or unloading position. Throop shows wheels mounted upon the draft frame and adapted to support the scraper and frame when the scraper is in the scraping or loading position. From a consideration of Fig. 2 of this patent, it will be seen that when the scraper is tilted into the unloading position the wheels are lifted clear of the ground and the weight of the implement is then carried upon the end walls of the scraper. “In contrast with this method of operation, it is to be noted that in applicant’s device the wheels are mounted upon the end plates of the scraper eccentric to the axis about which the scraper tilts relative to the frame. The point of mounting the wheels is so located that when the scraper is in the loading or scraping position the wheels are raised clear of the ground and the entire weight of the scraper and draft frame rests upon the cutting blade of the scraper to force this blade into the ground. Overloading of the scraper re-

sulting from excessive penetration of the blade is prevented by the upward force directed against the forwardly inclined back of the scraper by the soil accumulated in front of the scraper. When the scraper is tilted into the dumping or spreading position, the carrying wheels are brought into contact with the soil; and continued forward tilting of the scraper bowl increases the distance between the ground surface and the scraper blade. By this means the thickness of the dirt layer may be controlled.” (Emphasis added.)

The appellant further sought to impress this difference upon the Patent Office when he stated (Exhibit D, p. 50):

“One must be careful to distinguish between bringing the wheels into ground engagement by or as a result of tilting the scraper and between tilting or moving the scraper subsequent to or as a result of wheel engagement with the ground as is true in both McMillan and Bernard as well as most of the other cited art. There is not only a distinction but a difference since there is a different mode of operation in the two cases. By using the first mode of operation, applicant is enabled to operate the scraper and control its position relative to the draft frame and relative to the ground without requiring the wheels to rest upon the ground.”

Martin also quite clearly defined the term “tiltably movable” when he stated (Exhibit D, p. 49):

“Claims 22, 24 and 25 specify the scraper as being tiltably movable whereas in McMillan the scraper has no true tilting movement but is rigidly at-

tached to the draft frame and consequently has a vertical or a lifting movement.”

The expressions “tiltably movable” and “attached to the rear end of the draft frame and adapted when loading to rest on the ground to support the draft frame” in claims 10 and 11, clearly call for a particular structure and are essential limitations to the claims.

The Martin structure, not being supported by wheels during the scraping operation, would tend to dig into the ground without restraint, and in order to prevent this, Martin apparently decided that he must provide some substitute for wheels.

The problem of uncontrolled digging is first suggested on p. 1, c. 1, l. 29 of the Martin patent:

“To counteract the tendency for the scraper to penetrate the soil beyond desired depths, due to the load imposed by the weight of the scraper itself and that of the frame parts connected therewith, I provide means whereby a balancing or lifting effect is had on the scraper such as will prevent its becoming overloaded and assure even penetration.”

The appellant describes this structure (reference numeral 21a) and its mode of operation by stating (Pat. p. 2, c. 2, ll. 17-50):

“As the scraper fills, the weight of the soil adds to the initial loading and is normal to the scraper surface at all points. The result is a tendency for the blade to follow the line of least resistance and to penetrate directly into the soil in the same

direction that it is inclined. To counteract this tendency the top of the scraper back is curved as at 21a so that the pressure of the dirt against this curved surface is upward and opposes the downward load on the blade edge. The reaction against curved surface 21a is substantially parallel to the bottom 22.

“The result of this construction is that the blade at first digs into the soil because of the scraper weight and the soil pressure; but once the scraper is loaded, the pressure against the curve 21a is sufficient to prevent too deep penetration of the blade as a result of the load of soil.”

Frankly, we do not believe that the forwardly extending lip has any value or utility, as we will show later, but, even if it has, it was not new with Martin since we find the alleged phenomenon described in the Bunch Patent No. 1,783,941 (Exhibit E), particularly p. 1, c. 1, l. 55-70 which states:

“Another object of this invention is to provide a tractor attachment employing a blade, scraper or grading member which is adapted to be mounted in advance of the tractor and which is constructed to prevent the same digging in below a determinate depth during the grading, back filling or bulldozing or the like, due to the upward pressure of the material moved by said member.”

On page 2, c. 2, l. 94 to 101 Bunch makes clear his method of doing this and states:

“The pressure upwardly of the material against the upper overhanging portion 38 of the blade member, effectually prevents the blade member from digging into the material beyond the normal

capacity of the blade member, and hence, when once loaded, it will remain loaded during the entire period of its forward movement.”

The member 38 is illustrated in both Figures 1 and 3 and is the top forwardly curved portion of the scraper member 37.

Thus Martin has only adopted what has been referred to in the prior art as being a means for preventing a blade from digging too deeply into the dirt and has used this member on a specific type of scraper.

Be-Ge will show that it uses neither. We will show that the Be-Ge scraper blade is rigidly secured to the draft frame and is *not tiltable* with respect thereto. The Be-Ge device is at *all times*, including the loading cycle, supported upon its wheels. Be-Ge simply does not make use of the lifting effect. If the effect existed it would be contrary to the mode of operation desired by Be-Ge, to-wit, accurate positioning of the device under the sole control of the operator and not under the control of some outside force. (Tr. p. 293 and p. 325, as quoted on pages 36-38 of this Brief.)

THE BE-GE DEVICE.

The alleged infringing device is shown in Figure 3 of Exhibit C. It consists of a yellow draft frame which is connected to a vehicle such as a tractor by a draft connection shown at the extreme left hand side of the drawing. The scraper consists of a pair of green side walls and a purple scraper with a dark

blue upwardly extending back. An orange colored lever, which is pivoted at the back of the yellow frame, carries a pair of black wheels. When the orange colored lever is pivoted about the yellow pivot the frame and scraper will be raised or lowered because the wheels are in constant engagement with the ground. The yellow frame, green side walls, purple scraping blade and blue back portion are all welded together and form a single solid, rigid unit, so that the scraper is *not* movable with respect to the yellow frame.

When the Be-Ge device is drawn to the left as viewed in Figure 3 of Exhibit C, its purple scraping blade will engage the ground and scrape dirt upwardly, but the depth to which the purple blade cuts into the ground will be predetermined because the black wheels always rest on the ground and the depth of the cut is under the control of the operator and is not subject to any other force. When a load has been obtained or when the desired amount of dirt has been collected, hydraulic fluid under pressure is injected into the brown cylinder with the result that the upper end of the orange colored lever will be urged to the right. This will lift the yellow frame and the purple blade and the earth will pass under the raised blade and be spread to a depth determined by the cutting edge.

THE FINDINGS OF THE DISTRICT COURT ARE CORRECT.

This case was tried before the Hon. Dal M. Lemmon who had the opportunity of observing the witnesses and of determining their credibility.

There was conflicting evidence on substantially every point of the case. The appellant, Mr. Martin, testified extensively on his own behalf, and during his rebuttal contradicted everything that had been said by the appellees' witnesses. Needless to say, the appellees hotly contested every assertion of validity and infringement.

We believe it would serve no useful purpose to set forth the conflicting testimony relating to matters of validity and infringement in this brief, because we believe that all points are clearly set forth in the briefs of both parties. We feel that in situations of this type, the position of the Court should be that set forth in *National Reserve Insurance Co. of Illinois v. Scudder*, C.C.A. 9, 71 Fed. 2d 884 at pp. 887-8.

"It would serve no useful purpose to set forth the conflicting testimony relating to payment of the mortgage, because after an examination of the record, we feel bound by the well-settled rule that the findings of the Chancellor, based on conflicting evidence, are presumptively correct and will not be set aside unless a serious mistake of fact appears."—See *Coats v. Barton* CCA 8, 25 F 2d 813, 815; *Grace v. Tannehill* CCA 5, 54 F 2d 1059, 1061; *Clarke v. Hot Springs Electric Light & Power Co.* CCA 10, 55 F 2d 612, 615; certiorari denied 287 U. S. 619, 53 S. Ct. 19, 77 L. Ed 537; *Klaber v. Lakenan* CCA 8, 64 F 2d 86, 89, 90 A.L.R. 783; *Suburban Improvement Co. v. Scott*

Lumber Co. CCA 4, 67 F 2d, 335, 336, 90 A.L.R. 330.”

We also believe that while it is true that on an appeal this Court must examine both the law and the facts, the Court ought not to disturb the Findings of Fact of the trial judge, especially where the evidence is conflicting and the credibility of witnesses is involved. *Malloy et al. v. New York Life Insurance Co.*, CCA 1, 103 Fed 2d 439; *Storley et al. v. Armour and Co.*, CCA 8, 107 Fed. 2d 499; *United States v. Appalachian Electric Power Co.*, CCA 4, 107 Fed 2d 769; *Occidental Life Insurance Co. v. Thomas*, CCA 9, 107 Fed 2d 876.

As O’Brien states in his *Manual of Federal Appellate Procedure*, 3rd ed., 1941, page 19:

“The provisions of the new procedural rules that the Findings of Fact of the Trial Judge are to be accepted on appeal unless clearly wrong under Rule 52a is but the formulation of a rule long recognized and applied by courts of equity.” *Guilford Construction Co et al. v. Biggs*, CCA 4, 102 Fed 2d 46; *Wittmayer et ux v. United States*, CCA 9, 118 Fed 2d 808.

O’Brien further states on page 20:

“Where there is a conflict in the evidence and the court below reached its conclusions by determining the right of the evidence and the credibility of the witnesses and giving due regard ‘to the opportunity of the trial court to judge of the credibility of the witnesses’, the appellate court will not say that the findings are ‘clearly erroneous’ ” citing *Cherry-Burrell Co. et al. v. Thatcher*, CCA 9, 107

F 2d 65, 69; *Maryland Casualty Co. v. Stark*, CCA 9, 109 F 2d 212, 214; *Dant & Russell v. J. D. Halstead Lumber Co.*, CCA 9, 103 F 2d 306; *Weber et al. v. Alabama-Calif. Gold Mines Co. et al.*, CCA 9, 121 F 2d 663 . . ., July 11, 1941.”

The trial Court properly rejected the assertions of the inventor and it should be noted that the Court made a finding which inferred that the Plaintiff's claims were extravagant (Finding of Fact No. 8). It is also clear that the learned Trial Judge accepted the evidence introduced on behalf of Be-Ge.

We will show that the Findings of Fact are clearly supported by the evidence.

THE PATENT IN SUIT IS INVALID.

The Honorable Dal M. Lemmon made the following Findings of Fact and Conclusions of Law regarding validity.

Findings of Fact

5.

That the claims of the patent in suit do not meet the affirmative tests of invention which have been announced by the courts.

6.

That said United States Letters Patent No. 2,014,479 is invalid and void in:

(a) That long prior to the alleged invention by the plaintiff and more than two years prior to the date of the application which matured into

said Letters Patent, the alleged improvements or all material and substantial parts thereof had been patented and described in the following patents in evidence, to-wit:

Scholder	1,341	September	26, 1839
Langdon	54,373	May	1, 1866
Beach	163,842	June	1, 1875
Palmer	225,637	March	16, 1880
Wood	265,295	October	3, 1882
Savage	804,625	November	14, 1905
Lage	1,296,295	March	4, 1919
Spreyer	1,343,097	June	8, 1920
Adams	1,435,575	November	14, 1922
Spreyer	1,633,464	June	21, 1927
McMillan	1,713,048	May	14, 1929
Hauser	1,759,982	May	27, 1930
Bunch	1,783,941	December	2, 1930
Ricks	1,806,219	May	19, 1931
Bird	1,808,733	June	2, 1931
Lytle	1,822,051	September	8, 1931
Le Bleu	1,826,252	October	6, 1931

(b) That each component or element of the claimed combination in the two claims of the Letters Patent sued upon is old and was old in the art more than two years prior to the date of the application which matured into said Letters Patent.

(c) That each component or element of the claimed combinations in the two claims of the Letters Patent sued upon contributes and performs only that function which it had performed in the prior art and there is nothing in any of the claims beyond the addition of one old element to another old element to make up the assemblage of parts without integration.

(d) That the total result or function of the elements (each of which is old), of each of the

combinations set forth in the two claims sued upon is a summation only of each one of the individual components or elements and is not something beyond that.

(e) That no unusual, unexpected or surprising consequences flow from the unification of the old elements described and claimed in the two claims of the Letters Patent sued upon.

7.

That the device described and claimed in claims 10 and 11 of the patent in suit is not an inventive advance over the prior art and did not involve more than the exercise of ordinary mechanical and engineering skill and knowledge and did not require invention.

8.

There is no justification in the record for the extravagant claims of the plaintiff that striking and surprising consequences flow from the unification of the several old elements described and claimed in the two claims in the Letters Patent sued upon.

9.

That the plaintiff's own testimony reveals that the alleged inventive concept is not so clearly described in the Letters Patent in suit as to enable a person skilled in the art to make or use the same.

Conclusions of Law

II.

That claims 10 and 11 of United States Letters Patent No. 2,014,479 are, and each of them, is invalid.

THE PRIOR ART.

We believe that a discussion of the prior art will clearly show that Findings 6, 7 and 8 are correct and are supported by the weight of the evidence.

The patent to Adams, No. 1,435,575 dated November 14, 1922, illustrates a device having a scraper 8 which is tiltable (about point 11) with respect to the draft frame 1. A hydraulic mechanism illustrated in Figure 2 serves, through cables 20 and 26, to tilt the scraper. The rear wall 8 is provided with a forwardly curving extension at the top. (Tr. p. 107.) Adams does not describe the lifting action claimed by Martin, but the scraper 8 has a forwardly curving extension which is startlingly similar to the shape of the forwardly curving extension (Appellees' Exhibit V) which Mr. Cantonwine testified was the genesis of the alleged invention. (Tr. p. 370.) It seems far fetched that in devices which are otherwise substantially identical, the addition of substantially identical forwardly curving extensions would not produce identical results.

The patent to Beach, No. 163,842 dated June 1, 1875, illustrates a device which is similar to Martin's in that a scraper A is provided which has side walls to which wheels F are secured. The scraper is tiltable with respect to the frame B and the scraper is provided with a forwardly curving extension. (Tr. p. 110, l. 23.)

Bird patent No. 1,808,733 shows, in Figure 3, a forwardly extending curved upper portion (Tr. p. 112, l. 5), like McMillan and Beach, but does not describe any lifting effect therefrom. Bird's forwardly

extending upper portion is similar to Cantonwine's drawing (Exhibit V) and similar to Adams.

The patent to Hauser, No. 1,759,982 granted May 27, 1930, is provided with a forwardly extending cross member. (Tr. pp. 96-7.) However the Hauser device is not tiltable in the same manner as the Martin device but is substantially identical to the Be-Ge device and is of the general type which is stated by Martin in his specification as being of an older type. (Tr. pp. 81-83.) Note the testimony of the witness Doble on pages 87 to 106 wherein that witness analyzed the claims of the patent in suit and applied them to the Hauser structure and to the Be-Ge structure and showed (1) the claims not to be infringed and (2) to be readable on the Be-Ge device *only* if also and equally readable on the Hauser device. This being so, if Be-Ge infringes, so does Hauser and the claims are invalid because that which infringes if later, anticipates if earlier. *Peters v. Active Mfg. Co.*, 129 US 530-537, 32 L.Ed. 738; *Knapp v. Morss*, 150 US 221, 228, 37 L.Ed. 1059; *Miller v. Eagle Mfg. Co.*, 151 US 186, 200, 38 L.Ed. 121.

The patent to Bunch, No. 1,783,941 dated December 2, 1930, recognizes the phenomenon claimed by Martin. (Tr. p. 141, ll. 14-17.)

In describing his device the inventor states:

"The pressure upwardly of the material against the upper overhanging portion 38 of the blade member effectually prevents the blade member from digging into the material beyond the normal capacity of the blade member and hence, when

once loaded, it will remain loaded during the entire period of its forward movement.” (Bunch patent, p. 2, c. 2, l. 94.)

Assuming such a phenomenon exists, it was recognized long before Martin made his alleged invention and was known to those skilled in the art. The mere adaptation of a known expedient to a known device is, as is so succinctly indicated in the A & P case, merely adding two and two and still getting four. *Great Atlantic and Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 US 147.

The patent to Lage, No. 1,296,295 dated March 4, 1919, illustrates a device whose scraper member is provided with an upwardly extending back curving forwardly at its top. (Tr. p. 135, l. 11.) Here again, we find a device which differs from the claims of the patent in suit only in that the scraper element is not tilt-able in the same manner as is the scraper element of the patent in suit. However, the scrapers of Hauser, McMillan, and Be-Ge are likewise deficient in this regard.

The patent to Langdon, No. 54,373 dated May 1, 1866 illustrates a device which is similar to Be-Ge’s device (Tr. p. 115, l. 2 to p. 116, l. 25), in that the scraping element is rigidly secured to the frame and is not pivotally connected thereto. However, like the Be-Ge device, it is provided with a forwardly extending portion P which is a part of the frame. In this manner Langdon, Hauser and Be-Ge (to name a few), are identical and the claims of the patent in suit read

upon Langdon in the same manner as they read upon the Be-Ge structure. That which infringes if later anticipates if earlier.

The patent to Lytle No. 1,822,051 dated September 8, 1931, shows a forwardly extending upper portion on its scraper element. (Tr. p. 142, ll. 12-16.) The scraper is pivoted with respect to the frame and is not secured rigidly thereto as it is in the Be-Ge or Hauser devices.

The patent to McMillan No. 1,713,048 dated May 14, 1929, shows a device which is similar to the Be-Ge device in many critical and important ways. A study of McMillan reveals that the frame is rigidly secured to the scraper element like Hauser's and Be-Ge's. The wheels on the McMillan structure are pivotally connected to the scraper in substantially the same manner and operated by a hydraulic jack in substantially the same manner as Hauser and Be-Ge. It is apparent, therefore, that if the movement of McMillan's scraper can be differentiated from Martin, so can Hauser's and Be-Ge's. During the prosecution of the patent application the appellant's counsel criticised McMillan in the following language:

"Assuming for the purposes of argument that the scraper blade is resting upon a hard surface like a concrete floor, it will be admitted that the wheels of McMillan may be raised off the ground; but it is submitted that such ground disengagement is contrary to the actual mode of operation of the scraper and is contrary to the necessary implications of the patent description." (Paper No. 8, dated April 18, 1933 of Exhibit D, p. 48.)

This was in answer to the Examiner's statement that the wheels of McMillan "may be raised from the ground as the scraper blade is tilted into scraping position", and that "as the scraper is tilted out of ground engagement the wheels move into engagement with the ground". (Paper No. 6 dated October 6, 1932, Exhibit D, p. 44.) Thus, in refuting the Examiner's statement which is the very argument which he is advancing here (that the Be-Ge structure may be operated in an infringing manner), Martin argued that such ground disengagement is contrary to the actual mode of operation of the scraper and is contrary to the necessary implications of the patent description. This argument was made for the purpose of obtaining the claims of the patent in suit and is a definite limitation upon the claims as it was accepted by the Examiner in granting the claims.

Furthermore, Martin argued that "Claims 22, 24 and 25 specify the scraper as being tiltably movable whereas in McMillan the scraper has no true tilting movement *but is rigidly attached to the draft frame and consequently has a vertical or lifting movement.*" (Paper No. 8, dated April 18, 1933, Exhibit D, p. 49.) Therefore when claim 10 calls for a tiltably movable scraper or "an adjustable scraper tiltably movable into and out of engagement with the ground" it calls for a definite type of scraper and not for a leveller whose scraper is rigidly connected to the draft frame.

The patent to Scholder No. 1,341 dated September 25, 1839 shows a device which illustrates all the ele-

ments of claim 10 and differs only therefrom in that Scholder does not specifically state in his specification that excessive soil penetration of the scraper bottom is prevented by a lifting force on the scraper. However this action is described in the Bunch patent. A glance at Bunch's scraper reveals that it is similar in shape to that of Scholder and if the alleged phenomenon exists in the Bunch structure it should also exist in Scholder.

The patent to Savage, No. 804,625 dated November 14, 1905, shows a device which is adjustable into and out of engagement with the ground in the same manner as Hauser and Be-Ge and which is rigidly secured to its draft frame. (Tr. pp. 118 to 120 incl.) It, too, is provided with a forwardly extending member 10 which is defined as a deflector to prevent the dirt from crowding over the upper edge of the scraper.

The Wood patent No. 265,295 dated October 3, 1882 illustrates a scraper blade which is rigidly secured to the draft frame and which is movable into and out of engagement with the ground in the same manner as Hauser and Be-Ge. (Tr. p. 122.) It is provided with a forwardly extending member F. The angle of the member F with respect to the angle of the scraper is (1) substantially identical to the angle of the device which the witness Cantonwine indicated was affixed to the rear of the appellant's device at Lido Isle, is (2) substantially identical to the angle of the appellees' cross frame member and is (3) substantially identical to the forwardly extending upper portion of

the Adams patent. If the phenomenon exists with respect to one, it exists with respect to all.

The only claims herein involved are claims 10 and 11 which are shown in Appellees' Exhibits A and B wherein they were broken down as follows:

Claim 10

A land leveler comprising

1. An adjustable scraper
tiltably movable
into and out of engagement with the
ground,
2. And means
to tiltably operate the scraper;
said scraper comprising
 - (A) An inclined bottom portion
 - (B) And an upwardly extending back
 - (C) Curving forwardly at its top to
produce a lifting force on the
scraper when the fully loaded
scraper is drawn forward,
 Whereby excessive soil penetration
of the scraper bottom is prevented.

Claim 11

In a tractor drawn land leveler of the character
described,

1. A draft frame
pivotally connected at its forward end
to the tractor
2. And a scraper
attached to the rear end of the draft
frame and adapted when loading to rest

on the ground to support the draft frame;
 said scraper
 comprising

- (A) A transversely extending, inclined bottom portion,
- (B) Forwardly extending end walls,
- (C) And an upwardly extending back
- (D) Curving forwardly at its top to produce a lifting force on the scraper when the fully loaded scraper is drawn forward, said lifting force limiting the soil penetration of the scraper bottom

The elements of the claims of the patent in suit are all found in the prior art.

Each of the prior art patents show a land leveler.

Claim 10 calls for an adjustable scraper tiltably movable into and out of engagement with the ground. This element is found in Adams patent No. 1,435,575, Beach patent No. 163,842, Lytle patent No. 1,822,051 and in Scholder patent No. 1,341. (Tr. p. 143, ll. 12-14, incl.)

The element defined as "said scraper comprising an inclined bottom portion and an upwardly extending back curving forwardly at its top" is found in the Adams patent, the Beach patent, Bird patent No. 1,808,733 and the patent to Bunch No. 1,783,941, as well as the Hauser patent No. 1,759,982, Lage patent No. 1,296,295, Langdon patent No. 54,373, Lytle patent No. 1,822,051, McMillan patent No. 1,713,048, Scholder

patent No. 1,341, Savage patent No. 804,625 and Wood patent No. 625,295. (Tr. p. 144, l. 15 to p. 145, l. 12.)

The limitation of the claim defined as “to produce a lifting force on the scraper when the fully loaded scraper is drawn forward whereby excessive soil penetration of the scraper bottom is prevented” is found and is described in the patent to Bunch. (See Bunch Pat. p. 2, c. 2, ll. 94 to 102.)

Claim 11 defines a device comprising a “scraper attached to the rear end of the draft frame and adapted when loading to rest on the ground to support the draft frame.” In claims 23, 24 and 25 of the patent application the inventor used the following expression: “said scraper being in weight supporting contact with the ground when in scraping position.” In the prosecution of the patent application and particularly in paper No. 8 dated April 18, 1933, when speaking of this limitation, the appellant stated (Exhibit D, p. 50):

“* * * * *

“One must be careful to distinguish between bringing the wheels into ground engagement by or as a result of tilting the scraper and between tilting or moving the scraper subsequent to or as a result of wheel engagement with the ground as is true in both McMillan and Bernard as well as most of the other cited art. There is not only a distinction but a difference since there is a different mode of operation in the two cases. By using the first mode of operation, applicant is enabled to operate the scraper and control its position relative to the draft frame and relative to the ground without requiring the wheels to rest upon the ground.”

From the foregoing it is obvious that the limitation in claim 11 is identical to the “tiltably movable” in claim 10 and that this is a necessary and desirable limitation as pointed out by the appellant. To the same extent, therefore, this limitation is found in the prior art.

It will be noted that a scraper which is defined as “tiltably movable” is not found in Hauser and McMillan. However, if Martin interprets the claims which are sued upon in a way which is contrary to his file-wrapper arguments (but which must be indulged in by him to substantiate his claim of infringement) then, and in that event, we will find that Hauser and McMillan also infringe. So interpreted, the claims, reading on prior art, are invalid.

It is apparent from the foregoing that each and every element of the patent in suit is old. The utilization of an old element to take advantage of a phenomenon found in nature does not produce a new and unexpected result and there is certainly no invention. On the contrary it is the type of patent which was condemned by the United States Supreme Court in the *A & P* case or, in other words, the old matter of two plus two equals four—no more. (*Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corporation*, 340 US 147.)

Finding 9 is supported by the evidence.

On rebuttal Mr. Martin testified with considerable firmness that none of the prior art devices disclosed

his inventive concept. For example, he bluntly stated that Adams (Tr. p. 418), Beach (Tr. p. 419), Bird (Tr. p. 420), Langdon (Tr. p. 420), Savage (Tr. p. 421), Wood (Tr. p. 422), Lage (Tr. p. 423), Bunch (Tr. p. 424) and Lytle (Tr. p. 426), all failed to disclose his concept.

On cross examination, however, he was unable to define his inventive concept and show where it was disclosed in his patent. (Tr. pp. 427 to 439.) This testimony is too lengthy to quote but the following is typical. (Tr. p. 427, l. 19 to p. 429, l. 6.)

Q. Well, Mr. Gabriel has just been saying "Does this patent disclose your concept." and I would like to know what is your inventive concept?

A. That would be, the concept, the design of the bowl with the lower rear inclined portion, from there to the central or vertical portion, and from there to a forwardly inclined portion or baffle known as "I".

Q. Now, then, it is the combination then of a lower rearwardly inclined portion and a central vertical inclined portion and a forwardly inclined top portion, is that right?

A. That is right.

Q. Well, now you just—let's see. Let's just take Hauser. Doesn't Hauser have a lower rearward inclined portion, a central vertical portion, and a forward inclined baffle?

A. Not in proportion to mine.

Q. Well, now, just a minute. What do you mean, not in proper proportion to yours?

A. It isn't—it doesn't show the same proportions.

Q. Well then, is it true that you have to have a certain proportion?

A. Well, fairly so, a certain proportion.

(Tr. p. 436, l. 17 to p. 437, l. 21.)

* * * * *

Q. (by Mr. Swain). Mr. Martin, does your patent disclose the inventive concept? Does your patent disclose the inventive concept?

A. I don't believe it does. It discloses the design and the method of it, but I don't know that if it concerns the dimensions or anything like that, that you have been trying to get out of me, I don't know.

* * * * *

Q. Since you can't tell me what constitutes a sufficient length of the lower inclined portion, can you tell me what constitutes a sufficient length of the vertical portion?

A. No more than the other.

Q. Can you tell me what constitutes a sufficient length of the forward inclined baffle member "I"?

A. Not exactly.

Q. Well, then, how can you take a look at a drawing and say that it doesn't have your concept?

A. It hasn't got the dimensions on it. You haven't got it, have you?

Q. Hauser doesn't have dimensions on it and yet you very positively stated that he doesn't have your concept.

Now I just want you to tell me what the concept is so you can show me in relation to your definition of the concept why Hauser doesn't have it.

A. All I can say it isn't in the same dimensions and proportions.

If a particular design or a particular relationship between the size, angles, or disposition of the particular parts is necessary "to produce a lifting force on the scraper" as required by the claims, that relationship is not shown by the patent in suit. For that reason the patent in suit is invalid because it fails to teach one skilled in the art how to produce the claimed invention. If the appellant argues that his teaching is sufficient, then it is respectfully submitted that the teaching of Adams or Beach is likewise sufficient inasmuch as both of them show the forwardly extending curved upper portion, one of which is approximately identical to that described by the witness Cantonwine, and the other of which is a greatly exaggerated forwardly curving extension. If the Bird patent does not illustrate the invention because some particular relationship between the parts is required, then the appellant's patent is invalid because it, too, fails in the same manner and to the same extent.

Finding 5 is simply a statement by Judge Lemmon made after hearing all of the evidence relating to the alleged invention, that it did not measure up to the inventive yardstick which has been announced in such cases as *Great Atlantic and Pacific Tea Co. v. Supermarket Equipment Corp.*, supra.

THE PATENT IN SUIT IS NOT INFRINGED.

Judge Lemmon made the following Findings and Conclusions on validity.

*Findings of Fact.***10.**

That the accused structures do not infringe claims 10 and 11 of said United States Letters Patent No. 2,014,479 in that:

(a) The patent in suit is for an alleged combination of elements in the land leveling art which art is an old and crowded one. At the time the plaintiff made his alleged invention there were well defined types of land levelers and the plaintiff's alleged invention relates to a land leveler of the specific type described in the specification of the Letters Patent in suit and claimed in said claims 10 and 11 which is a device in which the scraper when in scraping positions rests directly on the ground and is unsupported by its wheels, the mounting of the latter being such that in these positions of the scraper the wheels are raised off the ground and the weight of the leveler is carried entirely by the scraper, whereas in the defendants' devices the wheels ride on the ground not only when the scraper is out of engagement with the ground but when it is in scraping positions as well.

(b) In the defendants' devices the operator has complete control of the scraper at all times and there is no lifting effect imparted to the defendants' scraper by virtue of a lifting force on the scraper when the fully loaded scraper is drawn forward, said lifting force limiting the soil penetration of the scraper.

(c) The defendants' scrapers are not tiltably movable into and out of engagement with the ground, as required by claim 10 of the patent in suit.

(d) The defendants' scrapers do not have an upwardly extending back curving forwardly at its top to produce a lifting force on the scraper when the fully loaded scraper is drawn forward whereby excessive soil penetration of the scraper bottom is prevented, as required by claim 10 of the patent in suit.

(e) The scraper of the defendants' devices is not adapted when loading to rest upon the ground to support the draft frame, as required by claim 11 of the patent in suit.

(f) The defendants' scrapers do not have an upwardly extending back curving forwardly at its top to produce a lifting force on the scraper when the fully loaded scraper is drawn forward, said lifting force limiting the soil penetration of the scraper bottom, as required by claim 11 of the patent in suit.

(g) The frame member of the defendants' device is not the equivalent of the "upwardly extending back curving forwardly at its top" required by claim 10 or the "upwardly extending back curving forwardly at its top" required by claim 11 of the patent in suit.

(h) The function and mode of operation of the defendants' devices differ from the function and mode of operation of the device described and claimed in the Letters Patent sued upon.

(i) The evidence shows that the defendants' devices operate in the identical manner whether

the defendants' frame member (which is alleged by the plaintiff to be the equivalent of the "upwardly extending back curving forwardly at its top") is present in the defendants' device or is not present in the defendants' device.

Claim 10 of the patent in suit may be broken down into its various elements as follows:

A land leveler comprising

1. An adjustable scraper

Tiltably movable

Into and out of engagement with the ground,

2. And means

To tiltably operate the scraper;

Said scraper comprising

(A) An inclined bottom portion

(B) And an upwardly extending back

(C) Curving forwardly at its top to produce a lifting force on the scraper when the fully loaded scraper is drawn forward, whereby excessive soil penetration of the scraper bottom is prevented.

As has been previously pointed out in this brief, Martin, in securing his patent over the resistance of the Examiner in the United States Patent Office, (whose resistance was ultimately worn thin by the arguments which the appellant would now like to forget), argued that the "tiltably movable" limitation in the claim was an important one and distinguished over prior art such as McMillan in which the scraper was rigidly secured to the draft frame.

The "tiltably movable" limitation in the claim requires that, to infringe, a device must be of the appellant's particular classification and clearly removes from the claim a device of the type manufactured and sold by Be-Ge and Hauser.

Be-Ge does not have an upwardly extending back curving forwardly at its top. Be-Ge does have a frame member, one portion of which, like the identical portion in Hauser, lies adjacent to the upper edge of the scraper and which, like Hauser, is purely a frame member serving to strengthen the Be-Ge structure. There is nothing in the record to show that that force is sufficient to prevent excessive soil penetration of the scraper bottom. (Tr. p. 96, l. 1 to p. 99, l. 3.)

The testimony relating to the existence of such an upward force is only that of the inventor himself who testified vaguely that at various times and in various places he had noted this phenomenon. The examination of his testimony indicates, however, that it does not amount to the clear and convincing proof required to prove infringement. There is no time or place mentioned, nor is there any specific action to show that the appellant himself operated or really carefully studied the operation of the devices which are alleged to infringe. (Tr. p. 409, l. 12 to p. 411, l. 4.)

The testimony on behalf of Be-Ge is clear and convincing that there is only a negligible, if any force, exerted against the frame member by the upward moving earth.

Mr. Doble testified that tests upon Mr. Gurries' farm (which tests were viewed by Judge Lemmon through the medium of motion pictures (Exhibits T and X)) reveal that the force was so slight that Mr. Doble was able to place his hand between the earth and the frame member and feel no appreciable pressure. (Tr. p. 180, l. 6 to l. 17 inc.) The pressure was insufficient to break the skin, turn the finger nails or in any other manner materially affect the hand. Pressure which is this slight would not lift a Be-Ge scraper which weighs between 1,000 to 2,900 pounds as indicated by the catalog, Exhibit 1-A.

Moreover, the testimony of Albert E. Gurries and of his chief engineer, Mr. White, is conclusive that the lifting force is not wanted in the Be-Ge's structure and, if it were present, they would do everything they could to eliminate it.

Mr. Gurries' testimony was as follows (Tr. p. 293, l. 18 to p. 294, l. 5):

Q. And your scraper blade would have to be supported at all times and be accurately supported with respect to those two sets of wheels?

A. That is correct.

Q. Now, Mr. Gurries, would you, being the designer of this scraper, would you want any other lifting or any other controlling force?

A. No. No lifting force in the scraper, upon the body of the scraper.

Q. In other words, you don't want any force on that scraper over which you do not have actual and absolute control of at all times?

A. That is correct.

Mr. White testified as follows (Tr. p. 324, l. 4 to p. 325, l. 12) :

Q. Well, assume, though, that the dirt does pile up in the bowl and does engage that member "I", it is my recollection that your prior answer that you have never seen the dirt exert enough force to lift the scraper.

A. That is true.

Q. You believe it could under any circumstances?

A. I don't believe so.

Q. If it did, would it be desirable?

A. It certainly would not.

Q. Have you taken that into consideration in your design?

A. We have.

Q. Would that be a force which is beyond the control of the operator?

A. It would.

Q. And therefore undesirable?

A. Correct.

Q. Have you ever put your hand in front of that, the member "I" as the dirt was passing in front of it or passing against it?

A. I have.

Q. What effect have you noticed, if any?

A. Very slight contact with my hand.

Q. Has it bruised your hand?

A. Oh, no, just barely touched it.

Q. It hasn't taken the skin off?

A. No.

Q. What is the weight of that scraper, do you know offhand?

A. The weight of this one in this drawing? There are various widths, which weigh differently.

Q. Take a ten-foot width, what would be the weight of it, would you know?

A. Well, I could be accurate if we look at one of our—

Q. Take a guess?

A. A ten-foot one, well, I think it weighs over a thousand pounds.

The testimony of these witnesses is clear that it is Be-Ge's desire to produce a structure by which the ground may be leveled accurately, rather than by biting chunks out of the ground as the Martin device does. As Mr. Gurries pointed out, our device operates to a plane which is defined by the tractor vehicle and the two bearing wheels of the device. (Tr. p. 290, ll. 1 to 7; p. 293, ll. 2 to 21.) The cutting edge of the scraper blade is then positioned with respect to the plane (Tr. p. 290, ll. 1 to 7 inc.), and, as the blade is drawn over the field it will maintain a predetermined position which will not be altered or varied in any manner by the amount of dirt within it. Furthermore, when the scraper empties, its position to that plane will not be varied. (Tr. p. 291, l. 9 to p. 294, l. 8.)

This is contrary to the mode of operation of Mr. Martin's device in which the blade engages the ground and digs in until it is full, something which cannot happen with the Be-Ge (or Hauser) structure. When the appellant's device is full it comes out of the ground regardless of the wish of the operator, something which cannot happen with the Be-Ge structure. Our structure is designed to provide a scraping edge which is at all times solely under the control of the

operator as are devices of the type illustrated by McMillan and Hauser.

From the foregoing it is clear that claim 10 is not infringed because:

(1) The scraper is not tiltable as required by the claim.

(2) The Be-Ge device is not provided with an upwardly extending back curving forwardly at its top to produce a lifting force on the scraper whereby excessive soil penetration of the scraper bottom is prevented. This is for the reason that if there is any pressure (which is doubted) the same is insufficient to raise the scraper and for the further reason that we go to great lengths to design the device in such a manner that it will not lift contrary to the will of the operator.

Claim 11 is not infringed for substantially the same reasons as previously set forth in connection with our argument relating to infringement of claim 10.

Claim 11

In a tractor drawn land leveler of the character described,

1. A draft frame
pivotally connected at its forward end to the tractor
2. And a scraper
attached to the rear end of the draft frame and adapted when loading to rest on the ground to support the draft frame;

Said scraper
comprising

- (A) A transversely extending, inclined bottom portion,
- (B) Forwardly extending end walls
- (C) And an upwardly extending back
- (D) Curving forwardly at its top to produce a lifting force on the scraper when the fully loaded scraper is drawn forward, said lifting force limiting the soil penetration of the scraper bottom.

In the first place the accused device does not utilize "a scraper attached to the rear end of the draft frame and adapted when loading to rest on the ground to support the draft frame."

It will be recalled that appellant wore down the Examiner by continued and repetitive arguments wherein he stated (Exhibit D, p. 48, Paper No. 8 dated April 18, 1933):

"Assuming for the purposes of argument that the scraper blade is resting upon a hard surface like a concrete floor, it will be admitted that the wheels of McMillan may be raised off the ground; but it is submitted that such ground disengagement is contrary to the actual mode of operation of the scraper and is contrary to the necessary implications of the patent description."

Further on he indicated that it is also essential to his type of device that the scraper support the draft frame during loading. For example, he stated (Exhibit D, p. 50):

“One must be careful to distinguish between bringing the wheels into ground engagement by or as a result of tilting the scraper and between tilting or moving the scraper subsequent to or as a result of wheel engagement with the ground as is true in both McMillan and Bernard as well as most of the other cited art. There is not only a distinction but a difference since there is a different mode of operation in the two cases. By using the first mode of operation, applicant is enabled to operate the scraper and control its position relative to the draft frame and relative to the ground without requiring the wheels to rest upon the ground.”

He also made the following argument (Claim 29 is claim 10 of the Patent and claim 31 is claim 11 of the Patent. Exhibit D, p. 52):

“It is also the clear intent of these devices that the penetration be limited and determined by their supports, even though they be chains rather than by any soil pressure. Because of this difference in operation claim 29 is believed allowable.

The same remarks apply to newly submitted claims 31 and 32, though these latter claims additionally include the support of the draft frame by the scraper, which is a feature decidedly not present in the cited art.”

Be-Ge does not utilize this feature.

In addition Be-Ge does not utilize “an upwardly extending back curving forwardly at its top to produce a lifting force on the scraper when the fully

loaded scraper is drawn forward, said lifting force limiting the soil penetration of the scraper bottom”.

From the foregoing it is apparent that Claim 11 is clearly not infringed because:

(1) The accused device is not a device “of the character described”. It is of a different type as has been pointed out herein.

(2) The scraper is not attached to the rear end of the draft frame and adapted to rest on the ground to support the draft frame.

(3) The forwardly curving top does not produce a lifting force limiting the soil penetration of the scraper bottom.

Even should the Court feel that the rear frame members of the accused device is the equivalent of a forwardly extending rear scraper frame member the *Court must hold as a matter of law that infringement is lacking*. Assuming that earth does engage the forwardly extending rear scraper portion, and further assuming, contrary to the evidence, that there is a lifting force thereon, the effect of the lifting force is undesired, not wanted, and not used in the Be-Ge structure, and so infringement cannot be found.

It is well known that even though elements of construction are important, function is equally important and function and construction together are more important than terminology. “In order that there be infringement the accused device and the patented device must operate the same.” (*Shell v. Electric Auto Light Co.*, 98 Fed. Supp. 462.)

The case of *Williams v. Hughes*, CCA 10, 109 F. 2d 500, is authority for the proposition that in determining whether a device infringes, the Court must look to the mode or means of operation, the functions, and the effect of the patented device and the accused device. If these are substantially identical, the principle of the patent is appropriated. If they are not, the principle of the patent is not appropriated. Otherwise stated, the test is whether the two devices do the same work in substantially the same way and accomplish substantially the same results. It is apparent that in the instant action the two devices do not accomplish the same results in the same way. Mr. Martin accomplishes his result by a tilting action of the scraper bowl in combination with a lifting effect imparted to the scraper by earth entering the same. Be-Ge utilizes an entirely different mode of operation.

The case of *Holley v. Goldner Sales Co.*, CCA 6, 107 F. 2d p. 494, comprises an analysis of a situation similar to that confronting this Court. The invention related thereto a thermostatically controlled method of utilizing exhaust gases in automobile engines for properly heating the fuel mixture in the intake manifold. The Court stated that the claims which were finally granted were limited to the positioning of the thermostat as to expose it to air currents from the fan as distinguished from one which exposes it merely to the atmosphere surrounding the manifold.

The Court stated (p. 496) :

“ . . . But, even if the District Court had found that appellee's thermostat was reached by some

of these 'air streams' or 'eddies' it would not have infringed appellant's claims as the District Court properly construed them. Had they been construed broadly enough to be infringed by Appellee's thermostat because it is exposed to some of the 'air streams' or 'eddies' under the hood they would have been invalid since Fergus and Trussell had previously disclosed thermostatic devices that were exposed to indirect air currents from the fan.

"... The valve in appellee's device which controls the flow of exhaust gases is positioned differently and functions differently. It is not located in the exhaust manifold but in the passage that leads from the exhaust manifold to the jacket that envelops the inlet manifold. Because of its location, the opposite sides of appellee's valve are not subjected to alternate exhaust discharges that cause it to oscillate but all discharges impinge upon the same side. Moreover, appellee's valve is secured by a toggle spring that resists any tendency there might be to oscillate. The District Court found that any tendency that might exist for the Hupmobile (appellee's) valve to oscillate in response to motor pulsations and in opposition to the resistance offered by the toggle spring would be insignificant as compared with the major movements of the valve that result from increases and decreases of exhaust pressure in response to throttle changes during ordinary driving."

As in the above case, we have claims which have been limited during their prosecution. The Court stated that in the event the arguments of counsel

were ignored and the claims were broadened, the claims would read upon the prior art and be invalid. Then the Court went further and *stated that even though the claimed action might be found, it was so insignificant that infringement would not be found.*

This is directly in line with the testimony of the witness Doble in which he stated that although there may be some pressure on the scraper blade and the upper frame portions thereof, the pressure was negligible and certainly not desired. (Tr. p. 179, line 10, through p. 180, line 17.)

All of the foregoing, of course, assumes that the rear frame member of the Be-Ge device is the equivalent of a forwardly extending rear scraper member and ignores completely the testimony of the witnesses Doble, Gurries and White. In addition, any such assumption is contrary to the visual evidence, to-wit, the motion pictures (Exhibits T and X) which showed conclusively that the devices operated in the same way with or without the alleged forwardly extending member.

The tests show several things:

1. The tests show that the Be-Ge scraper operates in the same manner whether the forwardly extending frame member is retained in its normal position or whether it is removed leaving a straight vertical rear surface to the scraper.

2. The tests also show that scrapers of the Towner-Martin type operate in the same manner whether the angle iron is in position or not. (It must be kept

in mind that when the Towner-Martin device was operated without the angle iron, the weight of the angle iron was maintained by allowing it to lie on top of the scraper out of contact with the earth.)

3. The tests also showed conclusively that in the operation of the Be-Ge scraper, control of the cutting edge was maintained solely by the positioning of the rear wheels, in the same manner as in the McMillan and Hauser structures.

THE APPELLANT'S BRIEFS.

In this commentary, the appellees will follow the appellant's outline insofar as possible.

OPENING BRIEF.

II. THE INVENTION IN SUIT. (APPELLANT'S ANALYSIS.)

In his analysis of the invention in suit, appellant admits that his scraper member is attached to the rear end of the draft frame in such a manner that it could be tilted from a normal land leveling position to unloading or dumping position. The use of the word "tilt" herein must be the same as Mr. Martin used throughout the prosecution of his application and must refer to the pivotal connection between the scraper and the draft frame and cannot relate to the unitary construction adopted by the appellees.

On page 5 of his brief, appellant refers to the lifting force which is obtained by the operative en-

gagement of the earth with the forwardly curving extension of the scraper. It has been previously shown in our brief at pages 35-37, 45-46 that there was no lifting force in the accused Be-Ge scraper and that there is no lifting force in the Towner-Martin scraper which was tested. It is clear, therefore, that the appellant's own analysis of his "invention in suit" precludes any possibility of a holding that the appellees have copied the same.

Mental Concept. (Appellant's Analysis.)

Under this heading appellant seeks to disregard the language of the claims and to describe the alleged invention in what he chooses to call the "language of the streets". The "language of the streets" is not proper to the interpretation of a patent and the inventor is restricted to the "language of the claims". The reason for evading the language of the claims is transparent; the language of the claims simply does not include or read upon the accused Be-Ge structure.

However, let us examine the so-called "Martin mental concept". It is urged that the principal feature of the Martin invention is a forwardly curving extension affixed to the top of the upwardly extending back portion of Martin's *prior* scraper.

The inventor in his brief on page 9 now admits that the forwardly curving extension must be "of such a size and shape" that it will produce a lifting force upon the scraper. This conforms to the appellant's fuzzy description of his invention on cross-examina-

tion. (Tr. pp. 427 to 439.) If size and shape are essential, as they admittedly must be, then the patent in suit is invalid for the reason that the size and shape are not taught in the patent and thus the patent does not describe the invention in clear and concise terms as required by the patent statutes.

In *American Lava Co. v. Steward*, 155 Fed. 731, 736, CCA 6 (1907), the Court invalidated the patent and said:

“But in the then state of the art he was bound to differentiate his structure from those which preceded him; and especially is this so where the whole merit of his invention depends upon some peculiarity in the elements he employs. We think it may be affirmed as a rule resting upon the fundamental principles of patent law that, where the essence of the invention is the location, form, size or any other characteristic of the means employed, the patentee must distinctly specify the peculiarities in which his invention is to be found. . . . (*Germer Stove Co. v. Art Stove Co.*, 150 Fed. 141, 80 CCA 9; *Bullock Electric Co. v. General Electric Co.*, 149 Fed. 409, 79 CCA 229.)”

In the middle of page 9 appellant also states that no forwardly curving extension which will arrest the upwardly moving soil to produce a lifting force on the scraper is to be found anywhere in the prior art. This is at direct variance with the teaching of the Bunch patent.

The appellant goes on to say that the effect of arresting the upwardly moving train of soil by the

alleged new element is "to transform a loose moving train of soil into a generally static, solidly packed, rigid connection or brace" between the top of the upwardly extending back and the ground. This simply does not happen with the Be-Ge structure. The witness Doble and the witness White testified that they were able to place their hands comfortably between this so-called rigid connection or brace and the rear of the bowl without hurting their hands or without any undue pressure being exerted upon their hands. If there were, indeed, any kind of "rigid brace", the witnesses Doble and White would not have been able to put their hands between the soil and the forwardly curved rear portion. (Tr. pp. 180, 293, and 324.)

Apparently there are three different ways of defining the so-called invention herein and none of them fit the Be-Ge device.

(1) The first is the definition of the invention given by the claims of the patent in suit. Each of these claims calls for a tiltable bowl and a forwardly directed curved upper portion of the blade which was adapted to be engaged by the earth and thus lift the blade out of the earth. It has been shown that the Be-Ge scraper is not tiltable and that the device does not operate in the manner described in the claims.

(2) The second definition of the alleged invention is the nebulous theorizing advanced by the appellant himself and from this explanation two

things are apparent: that the alleged invention is not disclosed in the patent in suit and that the appellees do not utilize the alleged invention.

(3) The third method of expressing the alleged invention is found in the appellant's brief and it is apparent that the appellees do not utilize the alleged invention because (a) we do not utilize a so-called tiltable scraper; and (b) we do not use a forwardly extending portion "of such a size and shape" as to produce the alleged desired result of a rigid brace or connection.

III. INFRINGEMENT. (APPELLANT'S ANALYSIS.)

The appellees agree that the claims of the patent measure the invention. The claims having defined the alleged invention and the same not being present in the Be-Ge device, the claims are not infringed.

The appellant urges the so-called "doctrine of equivalents". It must be assumed that it is the appellant's contention that the tiltable mounting of his scraper is the equivalent of the rigid mounting of the Be-Ge scraper. Nothing could be further from the truth. The distinction is pointed out by the inventor himself in his file wrapper where he states (Exhibit D, p. 50):

"... There is not only a distinction but a difference since there is a different mode of operation in the two cases. By using the first mode of operation applicant is enabled to operate the scraper and control its position relative to the draft frame

and relative to the ground without requiring the wheels to rest upon the ground”.

Appellant urges the proposition that the purpose and intent of an infringer do not in any way affect the question of infringement. The intent of the appellees is not to utilize any lifting effect whatsoever and as has been previously shown, the law is that where a function is not utilized, although it may be present (which is not admitted here), the claims are not infringed. See pages 42-43 of this brief.

The appellant urges that where a patent covers a function never before performed, the patent is entitled to a broad and liberal construction, and claims for himself a so-called “pioneer patent”. The present patent is not a pioneer patent inasmuch as the concept which is referred to by Martin is found in the Bunch patent.

B. Infringement Has Been Conclusively Proven by Plaintiff Herein. (Appellant's Analysis.)

The appellant claims that he has proven infringement conclusively and points to his unsupported testimony. It is directly contrary to the mode of operation described by the witnesses Gurries, White and Doble. The learned District Judge rejected the inventor's testimony and accepted that of Gurries, and Doble and White.

On page 20 appellant quotes from his testimony relating to whether or not the Be-Ge device is a tiltably movable scraper. If the Be-Ge device is tiltable, then so is Hauser's, McMillan's and several others.

The appellant was also asked whether, in the operation of the Be-Ge device, earth engaged the upper frame member and prevented further soil penetration of the device. The appellant indicated that it did. The lower Court saw visual evidence in the motion pictures that it did not. The Trial Judge found the pictures to be far more reliable than the unsupported testimony of an interested party.

C. Infringement Admitted by the Defendants' Expert Witness William A. Doble. (Appellant's Analysis.)

With respect to the alleged admissions of the witness William A. Doble, an unpleasant point is raised. The appellant makes a great deal out of the testimony of this witness and quotes him extensively. However, the witness' testimony is not presented fairly to this Court.

For example, on page 28, line 10 of the brief, certain testimony is quoted. However, certain very material portions of the answer are omitted. The answer should be as follows:

“With respect to the ground, *but not with respect to the frame*”. (Emphasis supplied.)

In line 14 of the same page there is an answer of the witness Doble which is given without the benefit of the preceding question. The preceding question is (Tr. p. 171 ll. 9-18 inclusive).

“Q. Therefore, there would be some tilting if the scraper moves into and out of the ground?

A. No, I won't say that, because that indicates there might be a tilting of the scraper with re-

spect to the frame, where there is no such tilting.

Q. Then——

A. There is tilting, if you want to define it that way, of the parts of the scraper and the draft frame with respect to the earth and to the tractor as the draft frame is raised or lowered with respect to the ground.”

Again on page 31, lines 3 and 4, the complete answer of the witness is not given and it is considered that it is pertinent. It should read as follows (Tr. p. 176, ll. 9-11 incl.):

“A. In a sense it would be a part of the bowl the same as the draft frame is part of the bowl, but the prime function of it is for stiffening and supporting purposes.”

Again on page 31 the entire answer beginning at line 15 is omitted by the appellant and on the same page, beginning at line 26, the entire answer is not given and should read as follows (Tr. p. 180, ll. 9-17 incl.):

“A. To the extent of that pressure it certainly would; but I—— as I have pointed out before, that pressure is so minute that it is not noticeable in the operation of defendant’s structure and the fact is I haven’t noticed it in plaintiff’s structure, and I felt the dirt in back of the forwardly extending upper portion of the bowl and it is soft and loose and I haven’t seen wherein that portion of the bowl in any way affected the penetration of the cutting edge into the ground.”

Appellee’s counsel is reluctant to raise questions of this sort and only does so because he is compelled to

put the testimony of the witness Doble in the proper light. The testimony of that witness when taken as it should be taken is clear and convincing. The trial judge rejected these arguments and gave credence to the testimony of this witness. By carefully editing anybody's comments or testimony, probably any desired interpretation could be tortured therefrom but it is respectfully submitted that the truth can be obtained only from the entire testimony and not from these isolated portions.

On page 33, the answer quoted in line 3 thereof is incomplete as is the answer quoted in line 18 thereof. The answer quoted on page 34, line 7, is incomplete.

On page 34 of his brief, the appellant urges that the fourth element of Claim 11 was admitted to be present by the witness Doble. Nothing could be further from the truth. The testimony of the witness Doble was conclusively to the contrary and was that there might be a slight lifting force but that if there was, it was negligible, that it was not used, and that it certainly had no lifting effect upon the Be-Ge device.

The witness Doble did not make any such admissions as claimed by the appellant and claims 10 and 11 are not infringed.

D. Mode of Operation, Function and Result. (Appellant's Analysis.)

The appellant attempts to bolster his comments regarding equivalency by trying to show, on pages 34 to 45, that the devices are equivalent in their operation, function and result.

He first relies on his own testimony. This testimony is contrary to the motion pictures, Exhibits T and X. These show that the operation of the Be-Ge devices with and without the alleged forwardly extending rear portion is identical, and that there is no lifting effect whatsoever. This being the case, the alleged mode of operation, function and result is entirely different and the desired result is lacking.

In the quotation in the appellant's brief on page 39, a portion of the answer beginning at line 18 of that page is omitted. Pertinent portions of the answer quoted on line 1 of page 40 are omitted. Here, again, certain selected portions of the witness Doble's testimony are tortured from their context.

The answer quoted at page 43, line 11, is incomplete. The complete answer places a different aspect upon the testimony.

The appellant criticizes some of the prior art devices because they utilize an angle iron brace of the same type as shown in the Towner-Martin land leveler. He totally ignores the forwardly extending rear plate portions of the type which are at an angle of between 30 and 60 degrees at the rear portion such as illustrated by Adams (Fig. 1), Savage (Fig. 1), Spreyer (Fig. 1) and Wood (Fig. 3).

3. Tests Performed by Appellees. (Appellant's Analysis.)

The appellant criticizes the appellees' tests shown in Exhibit X and states that the principal reason why these tests were of no value is that the wheeled tractor used for these tests did not provide sufficient drawbar

pull, because of lack of traction, whereby the mode of operation, function and result of claims 10 and 11 of the patent in suit will result. There is no teaching in the patent in suit that a tractor of a particular horsepower is required and as indicated by the witness White, the tractor which was used was that recommended by the Be-Ge people in their circulars. (Tr. p. 333, ll. 1-7.) The appellant does not comment upon the fact that the motion pictures indicated that the Be-Ge devices work equally well whether or not there was a so-called forwardly extending rear member.

The appellant further criticizes these tests upon the ingenious grounds that "the soil upon which the defendants ran their tests was too hard for the invention of Claims 10 and 11 of the patent in suit to operate in the manner stated in the patent in suit."

There is no teaching in the patent in suit that this invention can be made to work only on particular types of soil. Are these claims to be further limited by this ingenious argument to a device which infringes only on a particular soil, but which does not infringe when it operates on other soil? Does infringement occur only in Bakersfield and in the Imperial Valley and not in Salinas, Sacramento and elsewhere?

It must be concluded that there is no infringement of the claims of the patent in suit.

Validity—A. Over the Prior Art. (Appellant's Analysis.)

The appellant claims that a prior, accidental or unrecognized use or disclosure cannot act as anticipation but chooses to ignore the Bunch disclosure which is

not accidental and which has been recognized. Bunch specifically points out (p. 2, c. 2, ll. 16 and following) that there is a lifting effect. For that reason, all of appellant's list of authorities seems of little value.

For the same reason it does not appear that appellant's alleged contribution falls within the quotation from Walker, Section 57, quoted by the appellant on page 49 as follows:

"The reason of this rule arises out of that point of patent law policy, which rewards persons for teaching the public how to perform processes and construct things which nobody else in the United States knew how to perform or to construct, and relevant to which no adequate information could be found in any public patent or printed publication anywhere in the world."

The Bunch patent was available to anyone. For this reason, Mr. Martin is not entitled to a reward for teaching the public how to construct something Bunch had already taught them.

To further bolster his argument, appellant relies upon a quotation from the transcript and again fails to give the complete answer indicated at line 1, page 53, of its brief.

The appellant urges that the appellees have found nothing better than the prior art relied upon by the Patent Office. This is not a fact. Here again appellant quoted from the testimony of the witness Doble and again saw fit to eliminate a portion of the answer of that witness on page 58, line 13 of his brief. The witness did indicate that the patents were all in the

same general class and that some showed some elements better than others. As a matter of fact, the witness specified that McMillan, Bird, Langdon, Wood and others were pertinent. Much of the art relied upon, and certainly the Bunch patent, was not cited by the Patent Office during the prosecution of the application for the patent in suit. Hauser patent No. 1,759,982 was probably not carefully considered by the Patent Office inasmuch as it was cited only for the purpose of requiring division and was *not* relied upon heavily by the Examiner (File wrapper, page 27, Ex. D).

It is respectfully submitted that since Be-Ge did rely upon some patents which were not found by the Patent Office, including particularly Bunch, the doctrine expressed by the Hon. Judge Fee in *Jacuzzi v. Berkeley Pump Company*, 191 F. 2d 632 at 634, is pertinent:

“But, further, a great many of the patents, which were brought to light in this lawsuit and considered by the Trial Court, had not been previously considered by the Patent Office. Even one prior art reference, which has not been considered by the Patent Office, may overthrow the presumption of validity, and, when the most pertinent art has not been brought to the attention of the administrative body, the presumption is largely dissipated. Such is the case here.”

The appellant criticizes the Hauser patent at page 59 of his brief by stating:

“Another reason why Claims 10 and 11 of the patent in suit were clearly allowable over Hauser is that the various elements of the Hauser scraper

member were *not proportioned* in such a manner as to create the new mode of operation, function and result of the invention of Claims 10 and 11 of the Martin patent.”

These proportions which appear to be important now are not disclosed in the patent in suit and, as a matter of fact, are somewhat vague. Martin found them vague as he was unable accurately to pinpoint exactly what proportions, angles and particular relationship of the parts was required. (Tr. pp. 427 to 439.) Even the quotation which the appellant relies upon to show that the Hauser device does not utilize the same proportions seems to imply that if the proportions were correct, probably the Hauser device would be satisfactory since the only criticism of Hauser which appellant makes is the fact that it does not utilize the particular proportions, etc.

In quoting the testimony of the witness Doble, to support his cause, however, appellant again fails to give the complete answer at line 10, page 61.

It is clear that the prior art which is relied upon by the Appellees is not merely cumulative but shows important references which were not relied upon by the Patent Office.

3. Individual Prior Art Structures. (Appellant's Analysis.)

Be-Ge has analyzed the prior art structures extensively in this brief and will not comment upon the appellant's analysis of them other than to point out that the analysis of the Bunch patent on page 66 of the appellant's brief is entirely erroneous.

B. PLAINTIFF'S STRUCTURE IS A TRUE INVENTIVE COMBINATION AND HAS UTILITY. (APPELLANT'S ANALYSIS.)

The appellant criticizes the evidence introduced by the Appellees including the motion pictures and the testimony of the witness Doble. The motion pictures showed clearly that the Be-Ge device would work equally satisfactorily with or without the angle iron portion at the rear end thereof and also that the Towner-Martin scraper operated satisfactorily with or without the forwardly extending rear portion.

Moreover, the witness Doble testified that he had examined the Be-Ge structure, with and without the added frame portion, and that **AS TO THOSE DEVICES THERE WAS NO LIFTING EFFECT.** (Tr. p. 180, ll. 2 to 24.) To the same effect see the testimony of White (Tr. p. 322, l. 1 to p. 325, l. 11).

This conclusively shows that the alleged invention is not used in the Be-Ge device. It also shows that in a device of this type the invention has no utility.

The appellees do not infringe the claims of the patent in suit and do not admit utility. As a matter of fact, the appellees go to great length to avoid the use of the alleged inventive concept.

THE APPELLANT'S REPLY BRIEF.

The appellant's reply brief is of course directed to the brief which the appellees filed in the lower Court and does not relate particularly to the matters in this brief. However, certain comments with respect to the reply brief are necessary. For example, on page four

of the reply brief, Martin states that Claims 10 and 11, which were the claims sued upon, are not limited to a pivoting action between the scraper and the frame. We believe we have shown this not to be the case and believe that the only interpretation of the claims which is justified requires as an essential that the scraper must be pivotally connected to the frame and cannot be rigidly secured to the frame.

In this connection it should be noted that the file wrapper arguments to which we have referred are arguments of a general nature and were made by Martin to distinguish his invention generally from the prior art. For the most part, the arguments to which we refer do not relate to specific claims.

It is interesting to note the assertion in the reply brief that Be-Ge changed its position and placed its principal reliance upon the Bunch patent rather than the Hauser patent. Nothing could be further from the truth. Be-Ge relies upon Bunch, Hauser, and many other prior art patents.

CONCLUSION.

The Court of Appeals must affirm the judgment of the District Court.

The Martin patent is clearly invalid as each and every element thereof and the function which is attributed to that element is found in the prior art.

The patent in suit is clearly not infringed by the Be-Ge device because the Be-Ge scraper is not "tilt-

ably movable'' into and out of engagement with the ground and because Be-Ge does not provide a forwardly extending member which is adapted to be engaged by the earth to limit the penetration of the scraper into the ground.

If the claims of the patent in suit are interpreted sufficiently broadly to read upon the Be-Ge structure, then they must also read upon the prior art.

We believe this Court must adopt the findings of the learned trial judge, Dal M. Lemmon, who saw the witnesses and determined which of the two bodies of conflicting testimony should be believed.

Dated, San Francisco, California,
October 24, 1955.

Respectfully submitted,

WEBSTER & WEBSTER,

FLEHR & SWAIN,

By JOHN F. SWAIN,

Attorneys for Appellees.

No. 14527

**United States
Court of Appeals**
for the Ninth Circuit

WIEL AND AMUNDSEN, A/S, as Claimant of
the S.S. ROMULUS,

Appellant,

vs.

ROY E. POTTER,

Appellee.

Transcript of Record

**Appeal from the United States District Court
for the District of Oregon.**

FILED

FEB 1 5 1955

PAUL P. O'BRIEN,

No. 14527

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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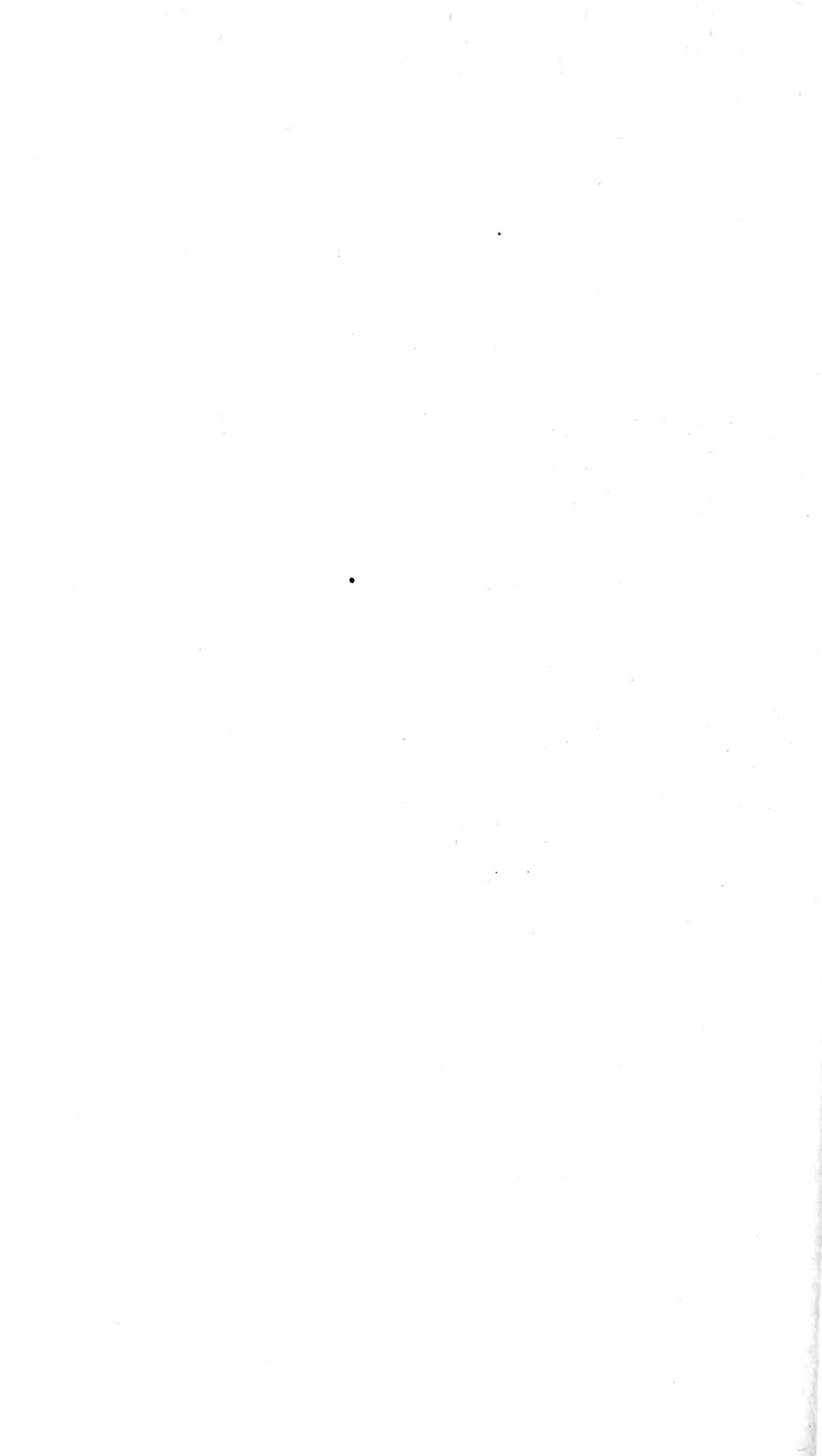
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In the District Court of the United States
for the District of Oregon

Civil No. 7202

ROY E. POTTER,

Libelant,

vs.

The "S.S. Romulus," Her Engines, Tackle and Gear, and Any and All Persons Claiming Any Interest Therein, and WIEL and AMUNDSEN A/S of Halden, Norway, and J. B. STAND of Oslo, Norway, and A/S LUDWIG MAIVENCKELS REDERI of Bergen, Norway, Owners and/or Charterers, and LATIN-AMERICAN LINES, Operators and/or Charterers,

Respondents.

LIBEL IN REM AND IN PERSONAM WITH
FOREIGN ATTACHMENT

To the Honorable Judges of the United States District Court for the District of Oregon, in Admiralty Sitting:

The libel and complaint of Roy E. Potter, long-shoreman, in a cause of personal injury and tort, civil and maritime, against the SS Romulus, her engines, tackle and gear, and any and all persons claiming any interest therein, and Wiel and Amundsen A/S of Halden, Norway, and J. B. Stang of Oslo, Norway, and A/S Ludwig Maivenckels Rederi of Bergen, Norway, owners and/or charterers, and

Latin-American Lines, operators and/or charterers, respectfully shows on information and belief:

Article I.

That during all the times herein mentioned, the SS Romulus was and now is, and during the currency of process herein will be within the State of Oregon, and upon navigable waters of the United States of America, and within the jurisdiction of this Honorable Court; that at all times herein mentioned the owner of said vessel was and now is Amundsen A/S of Halden, Norway, and J. B. Stang of Oslo, Norway, and A/S Ludwig Maivenckels Rederi of Bergen, Norway, a corporation, company or concern of Norway, composed of citizens of Norway, and said vessel was chartered and/or operated by Latin-American Lines, a corporation, company or concern.

Article II.

That at all times herein mentioned, libelant was a longshoreman and on or about September 26, 1953, was engaged in assisting to load said vessel with cargo at City Dock, Coos Bay, Oregon, and libelant and other longshoremen were in the employ of a master stevedore, to wit, Independent Stevedoring Co., when libelant, during the course of his employment, met with the injuries and accident hereinafter set forth.

Article III.

That while libelant was performing his duties as a hatch boss at No. 1 Hatch, he was suddenly caused,

solely by the unseaworthiness of said vessel and negligence of said ship owner, its charters, agents, officers, employees and representatives, to fall with great force and violence upon the deck of said vessel, causing him severe bruises and contusions to his head and body, severe nervous shock, mental and physical pain and suffering, a severe tearing, twisting and wrenching of the bones, muscles, tendons, ligaments and soft tissue of his body, from all of which libelant suffered great pain, was rendered sick, sore, nervous and distressed and has been permanently injured, and all to his damage in the full sum of \$30,000.00.

Article IV.

That libelant has incurred doctor, hospital and medical expenses and will incur further of the same; that libelant has lost wages from said accident and will lose further wages.

Article V.

That at the time of the happening of said accident, libelant was a healthy, robust, able-bodied man, capable of engaging in heavy manual labor, of the age of 36 years, with a life expectancy under the Standard Mortality Tables of 33.48 years; that this libelant's ability to work and perform manual labor has been seriously and permanently impaired.

Article VI.

That libelant elects to pursue a remedy against a third person, pursuant to the provisions of the Long-

shoremen's and Harborworkers' Act of the United States, and has filed with the United States Department of Labor, Bureau of Employees' Compensation, a notice of election to sue.

Article VII.

That said owners of said vessel are non-residents of the United States and of the State of Oregon and said owners cannot be found within the jurisdiction of this Honorable court; that said owners have effects within the jurisdiction of this court, to wit: The S.S. Romulus, a steamship. That said vessel is presently moored at Coos Bay, Oregon; that said vessel is in the possession of and as bailee of a person by the name of John Doe, the Master of said vessel, who it is believed holds said effect as a garnishee.

Article VIII.

That libellant's residence, domicile and address is 858 South 11th Avenue, Coos Bay, Oregon.

Article IX.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this honorable court.

Wherefore, libellant prays that process according to the course of this honorable court in a cause of admiralty and maritime jurisdiction may issue against the respondent vessel, S.S. Romulus, her tackle and gear, and that all persons claiming any interest in said vessel may be cited to appear and

answer all and singular the matters aforesaid; that this honorable court may be pleased to decree the payment of \$30,000.00 to libelant; that the respondent vessel, S.S. Romulus, may be condemned and sold to pay the same; that citation in due form of law may issue against the respondent herein, Wiel and Amundsen A/S of Halden, Norway, and J. B. Stang of Oslo, Norway, and A/S Ludwig Maivenckels Rederi of Bergen, Norway, and Latin-American Lines, citing it to appear and answer in the premises; that in case said respondent owner cannot be found within this district, then that all goods and chattels belonging to the said respondent within the district, and in particular the said vessel known as the S.S. Romulus, presently within this district, with its spare parts and accessories, all in the possession of the said John Doe, the Master of said vessel, may be attached by process of foreign attachment in the amount of \$30,000.00, the sum sued for in this libel, with interests and costs and disbursements of the libelant; and that said garnishee, John Doe, be cited and admonished to appear and answer on oath as to the said effects of the respondent in his hands.

/s/ NELS PETERSON,

/s/ FRANK H. POZZI,

Proctors for Libelant.

Duly verified.

[Endorsed]: Filed September 26, 1953.

[Title of District Court and Cause.]

CLAIM OF VESSEL

Comes now Wiel and Amundsen, A/S, owners of the S.S. Romulus, and claims said vessel and prays leave to defend this suit accordingly.

Dated: October 8, 1953.

WIEL & AMUNDSEN, A/S,

By J. J. MOORE AND COMPANY,
INC.,

Agents;

By /s/ ERSKINE WOOD.

Subscribed and sworn to before me this 8th day of October, 1953.

[Seal] /s/ W. A. LEAF,

Notary Public for Oregon.

My Commission Expires May 13, 1956.

WOOD, MATTHIESSEN,
WOOD & TATUM,

/s/ JOHN R. BROOKE,

Proctors for Claimant.

Service of copy acknowledged.

[Endorsed]: Filed October 12, 1953.

[Title of District Court and Cause.]

STIPULATION TO ABIDE THE
DECREE AND FOR COSTS

Whereas a libel was filed in this Court and cause on the 26th day of September, 1953, by Roy E. Potter, libelant, against the S.S. Romulus, her engines, tackle and gear, for the reason and causes in said libel mentioned; and

A claim to said vessel has been filed by Wiel and Amundsen, A/S, as claimant, and the said claimant and National Surety Corporation, duly authorized to do business in this jurisdiction and to execute this stipulation, hereby consenting and agreeing that in case of default and contumacy on the part of the claimant, execution may issue against their goods, chattels and lands in the Sum of Thirty Thousand Dollars (\$30,000.00);

Now, Therefore, It Is Hereby Stipulated and Agreed for the benefit of whom it may concern that the stipulators undersigned are jointly and severally bound in the sum of \$30,000.00, conditioned that the claimant above named shall abide by and pay the money, including costs and disbursements, awarded by the final decree rendered in this cause by this Court or in the case of appeal by the Appellate Court.

Dated: October 8, 1953.

WIEL AND AMUNDSEN, A/S,
By J. J. MOORE AND COMPANY,
INC.,
Agents.

By /s/ ERSKINE WOOD.

NATIONAL SURETY
CORPORATION,

By /s/ W. R. GILHAM,
Attorney-in-Fact.

Countersigned:

PHIL GROSSMAYER CO.,
Gen'l Agents;

By /s/ W. R. GILHAM,
Resident Agent.

The foregoing stipulation is hereby approved as
to form and amount this 12th day of October, 1953.

/s/ FRANK H. POZZI,
Of Proctors for Libellant.

[Endorsed]: Filed October 12, 1953.

[Title of District Court and Cause.]

NOTICE OF GENERAL APPEARANCE

Comes now Wiel and Amundsen, A/S, and hereby enters its appearance in the above-entitled suit.

Dated: October 8, 1953.

WOOD, MATTHIESSEN,
WOOD & TATUM,

/s/ JOHN R. BROOKE,

Proctors for Wiel and Amundsen, A/S, Respondents.

Service of copy acknowledged.

[Endorsed]: Filed October 12, 1953.

[Title of District Court and Cause.]

ANSWER

Comes now respondent and claimant and for its answer to the libel herein, admits, denies and alleges:

I.

Admits at all times mentioned herein the S.S. Romulus was upon navigable waters of the United States within the State of Oregon and jurisdiction of this Honorable Court, and that the owner of said vessel was Wiel and Amundsen, A/S, of Halden.

Norway, and the remaining allegations of Article I are denied.

II.

Admits the allegations of Article II, except respondent and claimant believes and alleges the S.S. Romulus was at the city dock in North Bend, Oregon, when what injuries, if any, were sustained by libelant.

III.

Denies all allegations in Article III.

IV.

Lacks sufficient information and knowledge to form a belief as to the truth of the allegations contained in Articles IV, V, VI, and VIII, and therefore denies the same.

V.

In Article IX denies all and singular the premises are true, but admits, if true, they are within the admiralty and maritime jurisdiction of this Honorable Court.

VI.

For its further, separate and affirmative answer and defense, respondent and claimant alleges that if libelant was injured as alleged, in his libel, said accident and injuries were caused solely or contributed to by libelant's own carelessness and negligence.

Wherefore, respondent and claimant prays that the libel herein be dismissed with costs, and that the respondent and claimant may have such other

and further relief as the justice of the cause may require.

WOOD, MATTHIESSEN,
WOOD & TATUM.

Duly verified.

Service of copy acknowledged.

[Endorsed]: Filed October 29, 1953.

[Title of District Court and Cause.]

PRETRIAL ORDER

This is a libel in rem and in personam with attachment against the Steamship Romulus, claimed by Wiel & Amundsen, A/S, and a general appearance has been made by said company. This action is for damages and personal injuries allegedly sustained by libelant and is based generally on the theories of unseaworthiness of the vessel and the negligence of the shipowner.

Admitted Facts

I.

Libelant is a resident of the United States of the District of Oregon and resides in the City of Coos Bay, Oregon.

II.

That the S.S. Romulus was in the Port of North Bend, Oregon, and upon navigable waters of the United States and within the jurisdiction of this Court at the time of service of process herein.

III.

A general appearance has been made by said company. Said company owned said vessel.

IV.

That on or about September 26, 1953, libelant was engaged as a longshoreman by the Independent Stevedoring Company, a master stevedore, who was loading said ship at the City Dock in North Bend, Oregon. Libelant was an acting hatch boss on said date.

The S.S. Romulus is a lumber carrier vessel somewhat smaller than a liberty ship. That on said date of the accident the vessel was portside to the dock. Libelant went to work at 8:00 a.m. on the date of the accident. The accident occurred at approximately 8:30 a.m. Libelant's gang was assigned to No. 1 Hatch. At said time and place No. 1 Hatch had lumber cargo on deck in each wing of the vessel approximately 7 feet high. The gang was taking lumber in the square of the hatch. At that time, libelant was standing on top of the deck load on the port side. Libelant wanted to talk to the walking boss, the supervisor employee of Independent Stevedoring Company. Libelant stepped from the top of the deck load to the outside edge of the forepeak. Libelant then side-stepped along the outside of the forepeak holding onto the top rail. When he got almost to midship and to where the walking boss was, the top rail that he was holding onto pulled out causing libelant to fall backwards and downwards

a distance of approximately $7\frac{1}{2}$ feet to the main deck.

Said guard railing travels the entire afterend of the forepeak except for an opening approximately $2\frac{1}{2}$ or 3 feet wide amidships from which a ladder leads from the forepeak to the main deck of the vessel. The forepeak stands approximately 7 feet above the main deck. The guard railing consists of three sections on the port side of the ladder. Each section consists of two upright stanchions approximately 3 feet high and 68 inches apart. Three metal connecting rods three-quarters of an inch in diameter spaced at intervals of approximately one foot connect to the stanchions beginning at the top. These rods are all securely and permanently fixed in place in all sections of the port guard railing except the section immediately to the port of the midship ladder, and in this section the rods are attached to the upright stanchions in such a way that they can be unhooked and swung free. At this section the end of the railings away from the ladder can rotate as a hinge. At the other end the railings are secured in place as follows: The upright stanchion has an eye into which a bend of the railings, hereafter called hook, is inserted from above the eye. At the time of the accident this eye of the hook was plugged with paint. There was no cotter-key in it nor was there a cotter-key in the other two hooks constituting the second and third railing down. At the time of the accident there was no mausing near or on the end of the hook that pulled free and the other two

hooks. At the time of the accident this section was not actively in use by the ship. The eye through which there could be a cotter-key or mausing to keep the hook from pulling free was plugged with paint.

V.

That libelant has elected to pursue a remedy against a third person pursuant to the provisions of the Longshoremen's and Harborworkers' Act of the United States and has filed with the United States Department of Labor, Bureau of Employees Compensation, a notice of election to sue.

VI.

It is admitted that doctor, hospital and medical expenses in the sum of \$351.00 have been necessarily incurred to date as a proximate result of said accident.

VII.

It is admitted that libelant earned \$5,410.00 in the calendar year 1951 from longshoring, and earned \$5,182.00 by longshoring in the calendar year 1952.

Contentions of Libelant

I.

Libelant contends that at the time and place of said accident said vessel was unseaworthy and said respondent, its officers, agents and employees, were negligent in one or more of the following particulars which proximately caused said accident:

1. In failing to have a permanent affixed rail

instead of the rail which pulled out when libelant was injured.

2. In having a rail where the eye of the hook was covered over so that it could not be secured.

3. In failing to have a hooking device in said rail which would prevent it from pulling out when someone took hold of it.

4. In failing to have said rail secured with a cotter-key through the eye of the hook, or shackle.

5. In failing to inspect said rail which pulled out immediately prior to said accident.

6. In failing to warn this libelant that said rail was not secured.

7. In failing to have the hook end of the top rail secured with mausing.

II.

That as a proximate result of said unseaworthiness and negligence, this libelant sustained severe and permanent injuries and permanent impairment of his ability to work and perform labor, was caused pain and suffering and will be permanently caused pain and suffering in the future, was caused severe nervous shock, physical and mental pain and suffering, a severe tearing, twisting and wrenching of the muscles, tendons, ligaments, soft tissue, bones and nerves of his neck, shoulders and back, a severe cervical strain, a lumbar strain, permanent damage and injury to the sensory nerve fibres in the region of his left shoulder and damage to the occipital

nerves and all to his damage in the sum of \$30,000.00.

III.

That as the proximate result of said unseaworthiness of said vessel and the negligence of respondents, libelant lost wages to date in the approximate sum of \$3,650.00 and will lose further wages, and will incur further medical expenses.

IV.

Libelant contends that he was earning in excess of \$100.00 per week at the time of said accident, and that he was off work as the result of said accident and from the date of said accident to March 8, 1954, and since said March 8, 1954, has been working part-time only, and that all lost time from the date of said accident to the present time is the result of said accident.

V.

Libelant contends that at the time of said accident he was a healthy, robust and able-bodied man of the age of 35 years' capable of doing strenuous physical labor with a life expectancy under the Standard Mortality Tables of 33.48 years.

Contentions of Respondent

1. Denies all contentions of libelant.
2. Libelant's injuries were not caused by the negligence of the shipowner or unseaworthiness of the vessel.
3. Libelant was contributorily negligent due to

the unsafe way in which he chose to perform his work.

4. There were two safe and practicable ways in which libelant could have performed his work.

5. In choosing to perform his work unsafely, libelant was negligent and this negligence proximately caused libelant's fall and resulting injuries, if any.

Further Contentions of Libelant

Libelant denies all of the contentions of respondents.

Libelant's Exhibits

Nos. 1-A, 1-B, 1-C, 1-D, 1-E, 1-F, 1-G, 1-H, and 1-I—Photos.

No. 2—Dr. R. Bigg's medical notes, X-rays and records.

Nos. 3-A and 3-B—Hospital records and X-rays from Keizer Memorial Hospital.

(Unauthenticated.)

Respondent's Exhibits

No. 4—Pacific Coast Longshore Agreement.

No. 5—Pacific Coast Marine Safety Code.

Nos. 6-A, 6-B, 6-C, 6-D, 6-E, 6-F, 6-G, 6-H, and 6-I—Photos.

No. 7-B—Dr. Berg's medical notes, X-rays and records.

No. 8—Deposition of Libelant.

No. 9—Sketch of vessel's forepeak.

No. 10—Extract of deck log (unauthenticated).

No. 11—Stevedore Co. injury report.

No. 12—Libelant's medical records from Veterans' Adm.

The exhibits herein have been identified and received as pretrial exhibits, the parties agreeing with the approval of the court that no further identification of exhibits is necessary. In the event that said exhibits or any thereof, should be offered in evidence at the time of trial, such exhibits are subject to objection only on the grounds of relevancy, competency and materiality.

Expert Testimony

Libelant reserves the right to call expert witnesses. Respondent reserves the right to call expert witnesses.

This order represents the result of pretrial conferences held between the parties, their proctors and the judge presiding in open court.

It Is Hereby Ordered that the foregoing constitutes the pretrial order in the above-entitled cause and supersedes the pleadings in the within cause, but may be amended after signature or during trial only upon agreement of the parties or by order of this court to prevent manifest injustice.

Dated and Signed in open court this 8th day of June, 1954.

/s/ CLAUDE McCOLLOCH,

United States District Judge.

Approved:

/s/ FRANK H. POZZI,
Of Proctors for Libelant.

/s/ JOHN R. BROOKE,
Of Proctors for Respondents.

[Endorsed]: Filed June 8, 1954.

In the District Court of the United States
for the District of Oregon

No. 7202

ROY E. POTTER,

Libelant,

vs.

The S.S. ROMULUS, Her Engines, Tackle and Gear, and Any and All Persons Claiming Any Interest Therein, and WIEL AND AMUNDSEN, A/S, of Halden, Norway, and J. B. STAND of Oslo, Norway, and A/S LUDWIG MAIVENCKELS REDERI of Bergen, Norway, Owners and/or Charterers, and LATIN-AMERICAN LINES, Operators and/or Charterers,

Respondents.

MEMORANDUM OPINION

The case is close, but I think it comes within the framework of modern seamen's cases, both as to unseaworthiness and negligence.

Dated July 2, 1954.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed July 2, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come on for trial before me, libelant appearing in person and by and through Frank H. Pozzi of proctors, respondents appearing by and through Wood, Matthiessen, Wood & Tatum, and John R. Brooke of proctors, witnesses having been sworn and testified, exhibits having been admitted in evidence, argument of proctors having been had, and the Court being fully advised in the premises, hereby makes its findings as follows:

Findings of Fact

I.

That libelant is a resident of the United States and of the District of Oregon within the jurisdiction of this Court, and resides in the City of Coos Bay, Coos County, State of Oregon.

II.

That a general appearance has been made by respondent Wiel and Amundsen, A/S, and this Court

has general jurisdiction over said Company for the purposes of this cause. That said Company was the owner and operator of the said S.S. Romulus at all times herein mentioned.

III.

That the respondent vessel, S.S. Romulus, was in the Port of North Bend, Coos County, Oregon, and upon navigable waters of the United States, and within the jurisdiction of this Court, at the time of service of process.

IV.

That on September 26, 1953, libelant was engaged in working aboard said respondent vessel as a long-shoreman, by a master stevedore, to wit: Independent Stevedoring Company, and libelant was acting as hatch boss on said date. That said vessel is a lumber carrier, smaller than a liberty ship, and at the time of the accident was portside of the dock.

V.

That libelant sustained an accident aboard said vessel at Hatch No. 1 at approximately 8:30 a.m. on said date when an insecure railing gave way, causing libelant to fall 7½ feet from the forepeak to the main deck of said vessel, and that the cause of libelant's fall was the unseaworthiness of said vessel, and the negligence of respondent Wiel and Amundsen, A/S, the owners and operators of said vessel at said time and place.

VI.

That at the time and place of said accident respondent, Wiel and Amundsen, A/S, was negligent and the vessel was unseaworthy because the top rail was loose and was not affixed permanently or secured.

VII.

That at the time and place of said accident said vessel was unseaworthy and said respondent, Wiel and Amundsen, A/S, was negligent in failing to have a cotter-key or shaker or other device through said eye of the hook.

VIII.

I find that libelant has incurred doctor, hospital and medical expenses to date in the sum of \$351.00 as a proximate result of said accident.

IX.

I find that at the time of the happening of said accident libelant was earning in excess of \$100.00 per week and as a proximate result of said accident had lost wages to the date of trial in the sum of \$3,250.00, and will lose further wages.

X.

I find that as a proximate result of said negligence of said respondent company and the unseaworthiness of said vessel, and both, that respondent sustained said accident and as a proximate result thereof was caused severe pain and suffering, nervous shock, a severe tearing, twisting and wrenching

of the muscles, tendons, ligaments and soft tissue of the bones and nerves of his neck, shoulders and back, a severe and cervical strain, a lumbar strain, injuries to his body and neck, and impairment of his ability to work and perform labor. I find that at the time of the happening of the accident libelant was a healthy, robust, physically able man of the age of 35 years, capable of engaging in strenuous physical labor, and that he had a life expectancy under the standard mortality tables of 33.48 years.

XI.

I find that libelant did not choose an unsafe way in which to perform his work and that libelant himself was not negligent.

XII.

That libelant elected to pursue a remedy against a third person pursuant to the provisions of the Longshoremen's and Harborworkers' Compensation Act, and has filed with the United States Department of Labor, Bureau of Employees' Compensation Commission, notice of election to sue.

Based upon the foregoing Findings of Fact the Court makes the following:

Conclusions of Law

I.

That this Court has jurisdiction of the cause and the subject matter, and, that the respondent, Wiel and Amundsen, A/S, has submitted itself to the jurisdiction of this Court.

II.

That the injuries sustained by libelant in said accident of September 26, 1953, were caused solely by the negligence of said owners and operator of said vessel and the unseaworthiness of said vessel and its appurtenances.

III.

That libelant was not himself contributorily negligent.

IV.

That libelant is entitled to a Decree awarding him special damages in the sum of \$3,601.00, and general damages in the sum of \$10,000.00, and recovery of his costs and disbursements incurred herein.

Dated this 20th day of July, 1954.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed July 20, 1954.

In the District Court of the United States
for the District of Oregon

Civil No. 7202

ROY E. POTTER,

Libelant,

vs.

The S.S. ROMULUS, Her Engines, Tackle and Gear, and Any and All Persons Claiming Any Interest Therein, and WIEL AND AMUNDSEN A/S of Halden, Norway, and J. B. STAND of Oslo, Norway, and A/S LUDWIG MAIVENCKELS REDERI of Bergen, Norway, Owners and/or Charterers, and LATIN-AMERICAN LINES, Operators and/or Charterers,

Respondents.

DECREE

This matter coming on regularly for hearing before the Honorable Claude McColloch, Judge of the above-entitled Court, testimony having been adduced by parties, arguments having been made, the Court having made its findings of fact and conclusions of law, now, therefore,

It is Hereby Ordered, Adjudged and Decreed, that libelant, Roy E. Potter, have of and recover judgment against respondents, The SS Romulus, her engines, tackle and gear, and any and all persons claiming any interest therein, and Wiel and Amundsen A/S of Halden, Norway, in the sum of \$10,-

000.00 general damages, and the further sum of \$3,601.00 special damages, with interest at the rate of six (6%) per cent per annum from the date of this decree until fully paid, and

It is Further Ordered, Adjudged and Decreed, that libelant have of and recover judgment against respondents for his costs and disbursements taxed in the sum of \$.

It is Further Ordered and Decreed that upon payment of the Decree and costs and obligations taxed herein, that respondents, The S.S. Romulus, her engines, tackle and gear, and any and all persons claiming any interest therein, and Wiel and Amundsen A/S of Halden, Norway, and their sureties, shall be relieved from all further obligations from such stipulations as they may have filed in this cause.

Dated this 21st day of July, 1954.

/s/ CLAUDE McCOLLOCH,
United States District Judge.

[Endorsed]: Filed July 21, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Roy E. Potter and Peterson & Pozzi, his proctors.

Notice is hereby given that Wiel and Amundsen, A/S, as claimant of the S.S. Romulus and as re-

respondent, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final decree and the whole thereof entered in this cause on July 21, 1954, by which decree Roy E. Potter was awarded \$13,601.00 and costs against the vessel claimed by claimant, and this respondent.

Dated September 7, 1954.

/s/ LOFTON L. TATUM,

/s/ JOHN R. BROOKE,

WOOD, MATTHIESSEN,

WOOD & TATUM,

Proctors for Claimant and
Respondent.

Service of Copy acknowledged.

[Endorsed]: Filed September 9, 1954.

[Title of District Court and Cause.]

PETITION FOR APPEAL AND ORDER
ALLOWING APPEAL

Wiel and Amundsen, A/S, as claimant of the S.S. Romulus and as respondent, being aggrieved by the final decree entered in this cause on July 21, 1954, prays that it may be allowed to appeal from the said decree to the United States Court of Appeals for the Ninth Circuit.

Dated: September 7, 1954.

/s/ LOFTON L. TATUM,

/s/ JOHN R. BROOKE,

WOOD, MATTHIESSEN,

WOOD & TATUM,

Proctors for Claimant and
Respondent.

It is Hereby Ordered that the foregoing petition for appeal be, and the same hereby is, allowed.

Dated: September 9th, 1954.

/s/ CLAUDE McCOLLOCH,

United States District Judge.

Service of Copy acknowledged.

[Endorsed]: Filed September 9, 1954.

[Title of District Court and Cause.]

CITATION ON APPEAL

To Roy E. Potter and Peterson & Pozzi, his proctors.

Whereas Wiel and Amundsen, A/S, as claimant of the S.S. Romulus, and as respondent, has lately appealed to the United States Court of Appeals for the Ninth Circuit from the final decree rendered in the above-entitled cause on July 21, 1954, award-

ing damages to libelant, Roy E. Potter, and has given the security required by law.

You are therefore hereby cited and admonished to be and appear before the United States Court of Appeals for the Ninth Circuit at San Francisco, California, within forty days from the date hereof to show cause, if any there be, why the said decree should not be corrected and speedy justice done to the parties in that behalf.

Given under my hand at Portland in said district this 9th day of September, 1954.

/s/ CLAUDE McCOLLOCH,
United States District Judge.

Service of Copy acknowledged.

[Endorsed]: Filed September 9, 1954.

[Title of District Court and Cause.]

ASSIGNMENT OF ERROR

Wiel and Amundsen, A/S, claimant of the S.S. Romulus and as respondent appealing from the final decree entered in this Court and cause on July 21, 1954, makes the following assignment of error:

I.

The District Court erred in finding negligence against the respondent and unseaworthiness against the vessel and that such was the proximate cause of

libelant's injury, and in awarding damages in favor of libelant.

II.

The District Court erred in finding that the respondent was negligent and the vessel was unseaworthy because the toprail was loose and was not affixed permanently or secured.

III.

The District Court erred in finding that the respondent was negligent and the vessel was unseaworthy in failing to have a cotter key or shackle or other device through said eye of the hook.

IV.

The District Court erred in finding that the libelant did not choose an unsafe way in which to perform his work and that libelant himself was not negligent.

V.

The District Court erred in concluding as a matter of law that the injury sustained by libelant was caused solely by the negligence of said owners and operator of said vessel and the unseaworthiness of said vessel and its appurtenances.

VI.

The District Court erred in concluding as a matter of law that the libelant was not himself contributorily negligent.

VII.

The District Court erred in decreeing that libelant

have and recover from respondent and said vessel the sum of Thirteen Thousand Six Hundred One and No/100 Dollars (\$13,601.00) and costs.

/s/ LOFTON L. TATUM,

/s/ JOHN R. BROOKE,

WOOD, MATTHIESSEN,

WOOD & TATUM,

Proctors for Claimant and
Respondent.

Service of Copy acknowledged.

[Endorsed]: Filed September 9, 1954.

[Title of District Court and Cause.]

DOCKET ENTRIES

1953

Sept. 26—Filed libel in rem and in personam with foreign attachment.

Sept. 26—Filed stipulation for costs.

Sept. 26—Issued warrant of arrest and monition to marshal.

Sept. 26—Issued monition to marshal.

Sept. 29—Filed monition with marshal's return.

Sept. 29—Filed warrant of arrest and monition with marshal's return.

Oct. 12—Filed notice of general appearance.

Oct. 12—Filed claim of vessel.

Oct. 12—Filed stipulation to abide the decree and for costs.

Oct. 29—Filed answer of respondent.

1953

Nov. 18—Filed deposition.

Nov. 23—Entered order setting for pre-trial conference Dec. 7 and trial Dec. 8, 1953.

Nov. 30—Entered order striking from calendars.

1954

Mar. 29—Entered order setting for pre-trial conference Apr. 26 and trial Apr. 27, 1954.

Apr. 12—Entered order striking from trial on April 27 and resetting for trial on June 8, 1954.

Apr. 26—Entered order setting for pre-trial conference on May 31, 1954.

Apr. 26—Record of pre-trial conference.

June 2—Issued 2 subpoenas and 4 copies to attorneys for respondent.

June 7—Pre-trial conference had.

June 8—Filed petition for order for subpoena duces tecum.

June 8—Filed and entered order for subpoena duces tecum.

June 8—Record of trial by court and order continuing to June 15, 1954.

June 8—Filed and entered pre-trial order.

June 8—Filed memoranda brief of respondent.

June 15—Record of further trial by court and order setting for argument on June 16, 1954.

June 16—Record of argument and order taking under advisement.

July 2—Filed memorandum of court.

July 19—Record of hearing on proposed findings.

1954

- July 20—Filed respondents' requested amendments and deletions to proposed findings.
- July 20—Filed and entered findings of fact and conclusions of law.
- July 21—Filed and entered decree for libelant.
- July 26—Filed cost bill of libelant.
- Sept. 9—Filed petition for appeal and filed and entered order allowing appeal.
- Sept. 9—Filed citation on appeal.
- Sept. 10—Entered order sustaining libelant's objections to cost bill.
- Sept. 9—Filed notice of appeal by respondents.
- Sept. 9—Filed assignment of error.
- Sept. 9—Filed designation of parts of apostles.
- Sept. 14—Filed motion for order to transmit original exhibits to appellate court.
- Sept. 14—Filed and entered order to transmit original exhibits to appellate court.
- Sept. 17—Filed transcript of proceedings June 8 and 15, 1954.

United States District Court, District of Oregon

Civil No. 7202

ROY E. POTTER,

Libelant,

vs.

THE "S.S. ROMULUS," Her Engines, Tackle and Gear, and Any and All Persons Claiming Any Interest Therein, and WIEL AND ADMUNDSEN, A/S, of Halden, Norway, and J.B. STAND of Oslo, Norway, and A/S LUDWIG MAIVENCKELS REDERI of Bergen, Norway, Owners and/or Charterers, and LATIN-AMERICAN LINES, Operators and/or Charterers,

Respondents.

June 8, 1954, A.M.

Appearances :

FRANK H. POZZI, of
Proctors for Libelant.

JOHN R. BROOKE, of
Proctors for Respondents.

TRANSCRIPT OF TESTIMONY AND
PROCEEDINGS

Mr. Pozzi: May it please the Court, I would like to take up one matter before we commence this trial. I had planned on having Mrs. Betty Greenwald, who was the Assistant Superintendent of the Keizer Memorial Hospital in North Bend, to have her produce the medical records here this morning. I planned on taking the order this morning.

We planned on having the medical records here from the Keizer Hospital in North Bend this morning. Mrs. Greenwald was going to accept service of a subpoena and I was going to ask for an order of Court for the issuance of a subpoena.

However, I talked to Mrs. Greenwald last night by phone and learned that she was in bed, ill with a chronic kidney infection.

Therefore, I have reserved No. 3 in the pre-trial order for those records, and will ask the Court for an order for the issuance of a subpoena, and asking her to bring them next Tuesday morning. She said she could be back to work within a week.

The Court: Put on your witnesses. [2*]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

ROY E. POTTER, Libelant,
produced as a witness in his own behalf, and being
first duly sworn, was examined and testified as
follows:

Mr. Pozzi: Your Honor, there is a lengthy stipulation of facts in the pre-trial order. Specifically, referring to Paragraph IV on Page 1, I think that will assist the Court a great deal. We have attempted to boil this down.

The Court: Mr. Clerk, give him an order for the production of the records next Tuesday. Will that involve the taking of some testimony?

Mr. Pozzi: I do not think so.

The Court: Other than identifying the records?

Mr. Pozzi: No.

The Court: Date it for next Tuesday, then. Go ahead.

Direct Examination

By Mr. Pozzi:

Q. Your name is Roy E. Potter and you are the libelant in this case? A. That is right.

Q. Mr. Potter, speak loudly so the Judge can hear what you have to say. How old are you at the present time? A. 36.

Q. At the time of the accident, September 26, 1953, how old were you then? [3]

A. 36; I will be 37 in June.

Q. 37 in June? A. Yes, June 12th.

Q. You are a married man and this is Mrs. Potter sitting here in the back of the courtroom, is that right? A. Yes.

(Testimony of Roy E. Potter.)

Q. You have two children, I understand, aged seven and four? A. Yes, sir.

Q. And you live where?

A. 858 South 11th, Coos Bay, Oregon.

Q. How long have you been a longshoreman?

A. A little over four years in the union.

Q. I understand you started longshoring in the year 1947? A. That is right.

Q. Going back for a moment, Mr. Potter, before you started longshoring, you were in the service during World War II and were wounded, is that correct? A. Yes, I was.

Q. What kind of wounds did you have?

A. Shrapnel wounds.

Q. Where were these shrapnel wounds?

A. In the forepart of my leg here (indicating).

Q. You have pointed at the upper part of your right leg, is that correct? A. Yes. [4]

Q. What was the general condition of your health immediately before this accident? Was it good or bad? A. I was in good health.

Q. Were you able to do the regular work of a longshoreman? A. Prior to this accident, yes.

Q. When you worked at longshoring, what was your job? A. I was a hold man.

Q. That means working in the bottom of the ship, loading or unloading, down in the hold, is that right? A. That is right.

Q. What gang were you working in at the time this accident happened? A. Gang 21.

(Testimony of Roy E. Potter.)

Q. How long had you worked in this Gang 21?

A. Approximately a year.

Q. I understand your gang had begun to work this ship at what is known as the pulp dock on September 22, the Tuesday before the accident, is that about right? A. Yes, that is about right.

Q. And I understand the ship shifted over to the City dock, the place where the accident happened?

A. Yes.

Q. The accident occurred about 8:30 in the morning, is that about right? [5] A. Yes.

Q. What time did you turn to that morning?

A. 8:00 o'clock.

Q. On that morning, on the day of the accident, your job was that of acting hatch boss?

A. Yes.

Q. Your hatch boss was ill, is that right?

A. That is right.

Q. And you were taking his place that day?

A. Yes.

Q. When you went to work at 8:00 o'clock in the morning on the day of the accident—that was a Saturday, was it not? A. Yes.

Q. When you went to work that morning, tell the Judge the general description of No. 1 hatch where you were assigned to work.

A. Well, we had a load of lumber in the wing, down to our coaming, and I was to keep a three-foot clearance on the ship because they were still filling the bottom.

Q. In other words, each wing of the ship had

(Testimony of Roy E. Potter.)

lumber up to the forepeak—— A. Yes.

Q. The square of the hatch was still open?

A. Yes. [6]

Q. And the ship was being filled with lumber?

A. Yes.

Q. The boys were just finishing off?

A. Yes.

Q. This ship lying portside to the dock?

A. Yes.

Q. Immediately before the accident, I believe we have stipulated, you were on the port side on top of the lumber, is that right? A. That is right.

Q. Since the gang had begun to work at 8:00 o'clock, had you been on any other part of No. 1 hatch besides the port side? A. No.

Q. I am going to hand you Libellant's Exhibits 1-A to 1-I, inclusive. Do these pictures correctly show the No. 1 hatch and part of the forepeak of the *Romulus*? A. Yes.

Q. You will note that those pictures show that there is some lumber on top of the square of the hatch, and also that the booms are down for No. 1 hatch. A. Yes.

Q. Just immediately before the accident, as I understand your testimony, there was no lumber on the square of the hatch, on top of the hatch, is that correct? [7]

A. That is correct, there wasn't, because this was early in the morning.

Q. The booms, of course, then, would be up?

(Testimony of Roy E. Potter.)

A. That is right.

Q. You were using those booms?

A. Yes, that is right.

Mr. Pozzi: If your Honor please, three of Mr. Brooke's pictures are merely enlargements of the same pictures. His exhibits are No. 6-A to No. 6-I, and the enlargements I refer to are No. 6-B, No. 6-H and No. 6-I. We would offer in evidence at this time for the purpose of illustration, the pictures, Libellant's Exhibits 1-A to 1-I——

The Court: In accordance with our usual practice, all exhibits are deemed to have been offered and are admitted in evidence subject to any objections that may have heretofore been stated or that may hereafter be stated prior to the final submission of the case.

(Testimony of Roy E. Potter.)

Introduction of Exhibits

Libelant's Exhibits

Number and Description

1-A to 1-I—Photographs.

2—Dr. Begg's Medical Notes, X-rays and records.

4—Pacific Coast Lognshore Agreement.
ords and X-rays. [8]

Respondents' Exhibits

Number and Description

4—Pacific Coast Longshore Agreement.

5—Pacific Coast Marine Safety Code.

6-A to 6-I—Photographs.

7-B—Dr. Berg's medical notes, X-rays and records.

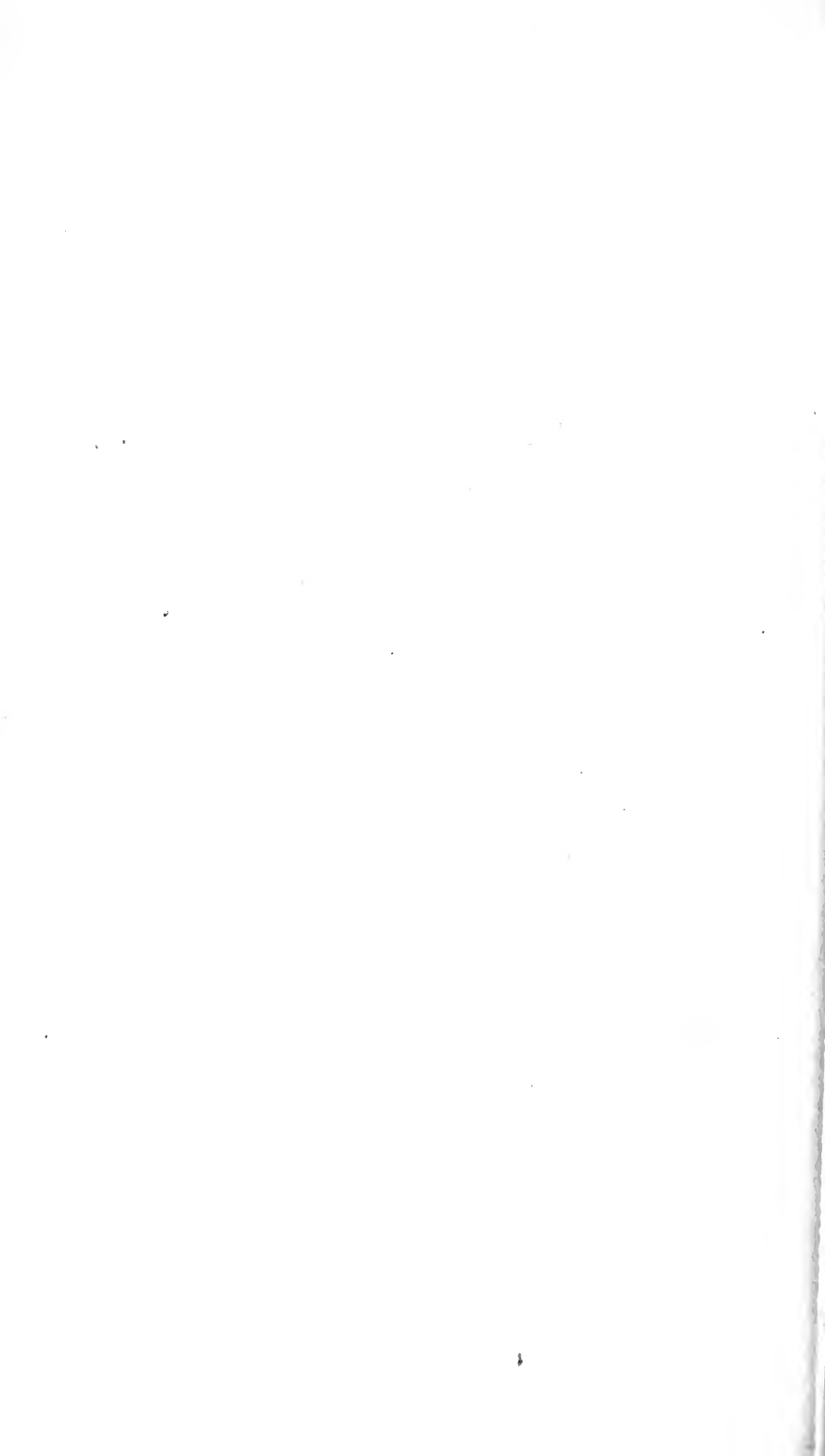
8—Deposition of Libelant.

9—Specs of forepeak.

10—Extract of Deck Log (unauthenticated).

11—Stevedore company injury report.

12—Libelant's medical records from Veterans Administration.



LIBELANT'S EXHIBIT NO. 1-B



LIBELANT'S EXHIBIT NO. 1-F



LIBELANT'S EXHIBIT NO. 6-D



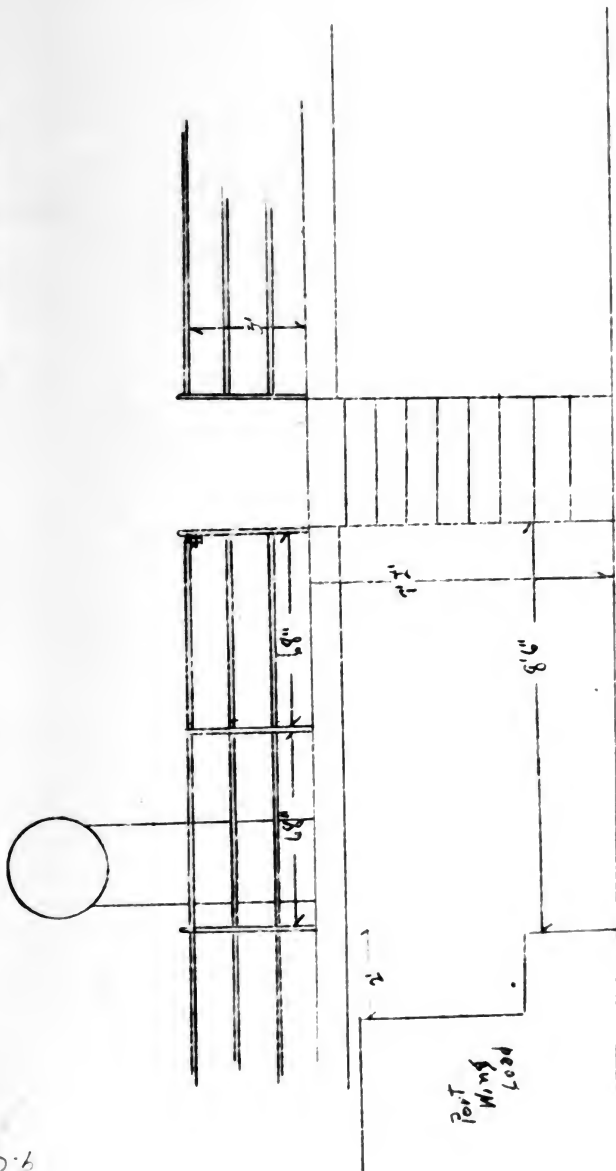
LIBELANT'S EXHIBIT NO. 6-H

Real

~~PLANNING~~
DEFENDANTS

EXHIBIT *9*

Case No. *22-57*
IRA G. HOLCOMB
Superior



9.0

(Testimony of Roy E. Potter.)

Q. (By Mr. Pozzi): This vessel you were on I understand is somewhat smaller than a Liberty ship, an old World War I type of vessel?

A. That is right.

Q. Would you tell the Judge in your own words what happened, how the accident happened?

A. Well, I started over to the walking boss to find out what the markings would be on some of that lumber, because I was the hatch boss. This rail that I had hold of was supposed to be secured. I figured it was just as safe a way as any, because [9] we have to walk over to that at all times when we are down in the hold.

I got within a foot from the ladder when this rail twisted out from me. I couldn't hold on, and I had to fall to the deck. I was going there to talk to Marvin.

The Court: This Exhibit No. 6-D, is that where it happened?

A. Yes, right here.

Q. That is where you were standing?

A. Yes, I was over to the ladder.

Q. (By Mr. Pozzi): In other words, you had started from the port side. How did you walk across?

A. Well, I slid this foot over and held on tight. My toes was under there so I couldn't slip.

Q. Did you slip when you fell?

A. No, I never slipped. When that rail pulled out, it let me down; couldn't do nothing else; wasn't anything to grab on.

Q. You fell over backwards?

(Testimony of Roy E. Potter.)

A. That is correct.

Q. How did you land, Mr. Potter?

A. On my head and shoulders and down here on my hip and my back.

Q. You are pointing to the back of your head and back of your shoulders? A. Yes. [10]

Q. And the middle of your back?

A. Yes, up here (indicating).

Q. Were you knocked out?

A. I was out for just a little bit, because when I got up I was still a little hazy.

Q. What is the first thing you remember after you fell?

A. Trying to sit up and Doug was there with me—Mr. Clark.

Q. You mean E. L. Clark, the gentleman sitting here? A. Yes.

Q. Where was he immediately before you fell? Where was Mr. Clark standing?

A. He was about two or three feet from the railing, on the forepeak.

Q. He was on the forepeak?

A. Yes. He was hatch tender.

Q. He was hatch tender? A. Yes.

Q. Was he facing you or not facing you when you fell? A. You said if he was facing me?

Q. Yes. A. Yes, he was facing me.

Q. In relationship to Doug Clark, where was the walking boss whom you were going up to see about the markings? A. He was right by the ladder.

(Testimony of Roy E. Potter.)

Q. Was he on the forepeak? [11] A. Yes.

Q. That is, you were just about to take another step and you were going up to him and start talking?

A. That is right.

Q. Did you, yourself, inspect the railing after you were hurt? Did you, yourself, look it over?

A. No, I didn't, but the steward did.

Q. All you know is that the railing pulled out?

A. That is right.

Q. Have you seen railings like that on other vessels? A. Yes, I have.

Q. What is the custom as to the ships securing those railings, if there is one?

A. When they are not in use and they are removable——

Mr. Brooke: For the purpose of clarity, are you speaking about the one that pulled out, or the whole section?

Mr. Pozzi: The top railing.

Mr. Brooke: The whole section along there, or just this particular section?

Mr. Pozzi: The section that pulled out.

Mr. Brooke: Did you understand that when he asked you the question?

The Witness: Yes, I did. Anything that is removeable is ship's gear and when we are not working and that is not in use, it is supposed to be secured; should have a chain or a [12] shaker to hold it in or a pin in there to keep it from slipping out.

Q. (By Mr. Pozzi): By "pin" do you mean a cotter key?

(Testimony of Roy E. Potter.)

A. Yes, or something similar to that.

Q. My question was directed to that. Was there a custom that a ship securing that, as you have observed on other vessels?

A. Yes, was supposed to be.

Q. Have you ever seen any of them tied off with mousings? Have you ever seen any?

A. I have seen some that was tied.

Q. Tied with lines?

A. Yes, so that they wouldn't slip out.

Q. Did anyone warn you before the accident that that railing was not secured? A. No.

Q. You mentioned a pin. Would you state whether or not you meant a cotter key?

A. That would be it, a cotter key that slips in that hole.

Q. After you fell, did Doug Clark help you up?

A. Yes.

Q. After you fell and Doug Clark helped you up to the forepeak, then what did you do?

A. I stayed around for a little bit and Marvin said, "How do you feel?" I said, "I don't know yet," because, you know, I was [13] still a little hazy.

The Court: How far did he fall?

Mr. Pozzi: It is 7 feet, 2 inches, your Honor, from where his feet were plus the length of his body to his head.

Q. How tall are you? A. 5 foot, 10½.

Q. When you landed on the deck, do you know

(Testimony of Roy E. Potter.)

yourself what you landed on besides the deck, if anything?

A. There was some peaveys laying there. I was bound to hit one or two of them, but that wasn't in my back.

Q. I understand you fell hard enough that it bent a steel hook, a cargo hook, that was in your hip pocket?

A. That is right.

Q. After you stood around for a while, where did you go? What did you do? Tell the Judge.

A. I went up to the hall and got an accident report and had that filled out. Then I went to the hospital and had some X-rays taken by Dr. Albertson.

Q. That is, the Keizer Memorial Hospital?

A. Yes. He said I couldn't work, so I went down to the ship and got hold of Marvin and notified him I couldn't work any more, and one of the boys took me to the hospital and he went to work in my place.

Q. Some man took you up to the hospital and brought you down to the ship to tell Marvin—— [14]

The Court: Identify him by name. Who is Marvin?

Q. (By Mr. Pozzi): When you say "Marvin" you mean the walking boss?

A. Yes, that is right.

Q. After you reported you couldn't work and you got a replacement, where did you go then?

A. I went home then. I had one of the boys drive me home.

Q. When you finally got home, how did you feel?

(Testimony of Roy E. Potter.)

A. Not very good, I will tell you.

Q. What was the trouble?

A. My head was starting to ache, then, and my back was starting to show up hurting.

Q. How about your neck and shoulder?

A. Yes, right in through here was stiff.

Q. You are pointing to the back of your neck?

A. Yes, right through here (indicating).

Q. How about the injury to your shoulder?

A. My left shoulder has been awful sore. It is getting a little better now.

Q. After you got home, what did you do?

A. I went to bed. My wife put me in bed.

Q. About what time did you get home?

A. Around 1:00 o'clock.

Q. I understand when you were at the hospital that morning you had quite a wait, is that correct? [15]

A. Yes, sir.

Q. Then you went home and went to bed about 1:00 o'clock on Saturday afternoon?

A. Yes.

Q. When did you next see a doctor?

A. Sunday morning.

Q. Where did you see him?

A. Over at Keizer's. I saw Albertson again. I had a pretty bad headache, so I went over to see him.

Q. How did you get over to the hospital?

A. A neighbor of mine took me over.

Q. What kind of shape were you in so far as your neck and back and general condition were concerned?

A. It was a little sorer Sunday than it was Saturday.

(Testimony of Roy E. Potter.)

Q. After you saw Dr. Albertson on Sunday morning at the hospital, what did you do then? First, what, if anything, did he do for you?

A. I told him my head was hurting pretty bad and he said, "You had better go to bed for a little bit."

Mr. Brooke: I object to any statement of what the doctor told you. You can tell what treatment he gave you, but not what the doctor said.

The Witness: He didn't give me no treatments at that time.

Q. (By Mr. Pozzi): Did he put you in bed at the hospital? [16]

A. Yes.

Q. And you stayed in the hospital on that day, is that correct?

A. Yes.

Q. Then what did you do?

A. I was at home that evening. I went to bed at home and my wife called Albertson.

Q. Then, as I understand, the next morning Dr. Albertson then referred you to Dr. Harris, an orthopedic surgeon?

A. Yes, I went to Dr. Harris on Monday.

Q. What did Dr. Harris do?

A. He took three X-rays of my head and he said, "You have got to go to the hospital."

Q. That is hearsay. Have you ever been a witness before, outside of the taking of your deposition?

A. That is the only time, only in the Army.

Q. The Army is a little different; but you are not supposed to say what someone else told you. You

(Testimony of Roy E. Potter.)

were rehospitalized, then, the following day, Tuesday morning? A. Tuesday morning, yes.

Q. And you were in the hospital until the end of the week, is that right? A. That is right.

Q. What did they do for you in the hospital?

A. Tuesday morning, when I turned in, they put me in traction. [17]

Q. What kind of traction? Just describe it.

A. On my head. They had a support lying around here (indicating), with a pillow under it here (indicating), and a weight went down from it. In other words, they were trying to stretch it, I guess.

Q. Did you remain in traction all the time you were in the hospital? A. Yes.

Q. Did they do anything else for you? Did they give you any shots or medicines?

A. They gave me some pills at night so I could sleep. It was pretty uncomfortable, that stuff was.

Q. After you got out of the hospital, what kind of treatments or care did you have?

A. Well, I took treatments at Dr. Harris' office every day, and then he put that collar around my neck to hold my chin up.

Q. He finally put you in a neck harness, is that right? A. Yes.

Q. And it held your neck stiff?

A. That is right.

Q. And held your head up? A. Yes.

Q. Do you know when it was he finally let you take that harness off?

(Testimony of Roy E. Potter.)

A. I believe it was two or three weeks after he put it on; [18] it was right around there; I don't remember what the date was.

Q. Were you referred by Dr. Harris to Dr. Roderick E. Begg for consultation by him here in Portland? A. Yes, I was.

Q. In November? A. Yes.

Q. When you went up to Dr. Begg in November, were you still wearing the harness? A. Yes.

Q. You saw Dr. Begg, I believe, November 13, 1953. How much longer after that were you wearing the harness? About how many days or weeks?

A. I really couldn't say truthfully.

Q. All right. If you don't know, don't try to say. Was this neck harness you wore comfortable?

A. Well, it was more comfortable than with the heavy cast on there.

Q. After you got out of the harness, which was some time after you saw Dr. Begg, what was your condition? How did you feel?

A. Well, I still had to keep taking treatments. My head just hurt.

Q. You were still under treatment for your back, neck and head? [19] A. Yes.

The Court: Do you want to put your doctor on?

Mr. Pozzi: Yes, if your Honor please.

(Witness temporarily excused.) [20]

DR. RODERICK E. BEGG

produced as a witness on behalf of Libelant, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pozzi:

Q. Dr. Begg, you are a regularly licensed and practicing physician and surgeon in Portland, State of Oregon? A. Yes.

Q. You are with the office of Dr. Chuinard and Dr. Noall? A. Yes.

Q. Do you have a specialty? A. Yes.

Q. What is your specialty?

A. Orthopedic surgery.

Mr. Pozzi: Do you admit the doctor's qualifications?

Mr. Brooke: Yes.

Q. (By Mr. Pozzi): You saw Mr. Potter, the libelant in this case, on what date?

A. On November 10, 1953.

Q. At whose request did you see him?

A. Dr. Norman Harris.

Q. Do you know Dr. Harris personally?

A. Yes.

Q. He is an orthopedic surgeon at Coos Bay and in that area? A. Yes, that is right. [21]

Q. The only one there? A. Yes.

Q. Dr. Begg, just state to the Court the history of Mr. Potter, and what your examination consisted of.

A. This patient's chief complaint was pain in his

(Testimony of Dr. Roderick E. Begg.)

neck and in his back and the back of his head and over the eyes, which he stated followed an accident which he had on the 26th of September which happened when a railing on board a ship gave way, causing him to fall. He estimated the distance was approximately 10 feet. He stated he hit on the back of his head and neck. It dazed him and he was unconscious following this accident. He regained consciousness—he does not know for sure how long it was, but it was a little while; but he was able to get up and walk afterwards; and he was taken to the hospital in—I am not sure—it was in Coos Bay, I believe—but it was the Keizer Hospital, and he was examined there by the local physician and was X-rayed.

Then this doctor referred him to Dr. Harris and, as I understand, he placed him in traction and also placed him in a cervical support after the traction was removed and, owing to the fact that his pain persisted, he was referred to me.

The patient stated further that he had a headache at the base of his skull that came forward in the region of the eyes, at the time I first saw him; and also he had a sensation, [22] he stated, as if his arms were going to sleep.

He was wearing a neck support at the time which he said he did not use all the time but used most of the time because it seemed to give him definite relief.

Q. Go ahead.

A. He further stated that he had pain in his back which had improved but was still persistent.

(Testimony of Dr. Roderick E. Begg.)

On my examination of him I removed the neck support. There appeared to be some very definite tenderness to pressure along the posterior or back part of the head and the upper part of the neck, the occipital region.

His motion was fairly free but guarded.

Q. Of what significance is that, being guarded?

A. He was fearful, probably, of pain, or getting some definite pain, if it was moved too freely after being supported in a brace.

The median, ulnar and radial nerves were found to be unaffected. That is in the cervical area, the neck region.

There appeared to be some decrease in sensation over the top of the left shoulder area and down on the arm to about the region of the insertion of the deltoid muscle. The lower arm appeared to be good, as far as sensation was concerned.

The cranial nerves appeared to be good—appeared to be functioning normally to gross test. [23]

Muscle strength in the upper extremities appeared to be within normal limits. Reflexes in both upper extremities were also normal.

He complained of back pain localized in the lumbar area. Back motion was reduced slightly, and the patient complained of discomfort in extremes of motion.

There was no significant muscle spasm noted in this region at the time of the first examination.

The reflexes in the lower extremities were normal with the exception of the Achilles reflex on the right,

(Testimony of Dr. Roderick E. Begg.)

which was absent. There was noted at that time some shortening of the right leg and atrophy of the thigh and calf muscles. That is, on the right side. However, that had been present since a prior accident, an old injury to the sciatic nerve in the upper thigh region during World War II. This reflex, he stated, had been absent ever since this injury to the sciatic nerve, due to shell fragment wounds.

X-rays furnished by Dr. Harris' office and additional X-rays taken in Portland revealed no evidence of bone or joint pathology, both in the AP, lateral and odontoid views in the cervical region, and this was within normal limits.

My diagnosis was cervical strain, lumbar strain, and decreased sensation over the top of the left shoulder as a result of strain and probably resulting edema of the sensory nerve fibers in this [24] region.

Q. You suggest, then, in your report, physiotherapy which would include heat and massage, is that right? A. Yes.

Q. Doctor, first as to cervical strain, what is that?

A. That is a tearing or stretching of some of the ligaments in the cervical region or muscles or both. It can be a combination of the muscles and ligaments, or it can be one and then the other. The severity depends upon the amount of stretching or tearing that takes place.

Q. Assuming that this man was on a walk seven or eight feet above—seven feet five inches—above

(Testimony of Dr. Roderick E. Begg.)

the steel deck of a vessel, and that he fell backwards that distance and lit on the back of his head and shoulders and upper back, do you have an opinion as to whether or not your findings here were related to that accident?

A. Well, it could very well be. It could be even more severe than I found it.

Q. Assuming further that Dr. Harris made a tentative diagnosis of a cervical disk——

Mr. Brooke: There is nothing in the record on that.

Mr. Pozzi: I am going to tie that up. I recognize there is nothing in the record on it, your Honor.

The Court: Go on.

Q. (By Mr. Pozzi): Assuming there was a tentative diagnosis by Dr. Harris of a cervical disk in the upper back, what significance [25] would that have in so far as your findings are concerned?

Mr. Brooke: I object to that question for the record.

The Court: Overruled.

Mr. Brooke: I object on the ground it is concerned with facts not in evidence.

The Court: Overruled. Answer the question.

A. Well, if you have a tear severe enough, a severe enough injury in the neck region, you can definitely easily injure the disk or cushion that is between those vertebrae, because when the supporting structures give way that disk or cushion can be displaced or ruptured with very little more trauma or the same amount of trauma.

(Testimony of Dr. Roderick E. Begg.)

Q. (By Mr. Pozzi): This pain or headache which he described to you as starting in the back of the head and as coming up over the head toward the eye, what causes that? Medically, what is the explanation?

A. The nerves that supply the back of the head on the outside come from the upper portion of the neck itself; they radiate up; the nerves come up over the back of the head, and any time that there is a stretching or tearing or even swelling or edema or hemorrhage in that region or in the region of these nerves, you will get pain, and that can produce headache in the back of the head, and it comes up over the eyes, and that is something we often find coming when we have occipital [26] pain. Why it comes I don't know, but when we get severe headaches in the back of the head we often get a headache in front, over the eyes.

Q. These nerves you refer to do not extend over the eyes? A. No.

Q. But it is very common, when you find they have this severe type of headache, that they have pain that often extends over to the top of their eyes, is that correct? A. Yes.

Q. What surface are you referring to?

A. Well, over the occipital—

The Court: You do not need to go into that. There is no point about that.

Q. (By Mr. Pozzi): Concerning the lumbar strain, the second part of your diagnosis, what was that based on?

(Testimony of Dr. Roderick E. Begg.)

A. Well, based on the history and physical findings at the time I saw him.

Q. Referring to the decreased sensation over the top of the left shoulder as a result of strain and probably resulting edema of the sensory nerve fibers, you found, as I understand, loss of sensation in the left shoulder which extended down the deltoid, is that correct? A. Yes.

Q. What is meant by "edema of the sensory nerve fibers"?

A. That is just one of the possibilities as to the cause of [27] this loss of sensation. It is the same thing that causes the headache, due to some injury in or around that nerve where it comes out through the vertebral column.

Q. Doctor, when did you next see Mr. Potter?

A. On the 26th of May this year.

Q. Did you again examine him? A. Yes.

Q. Go ahead and tell the Judge what you found.

A. His complaint still was that the headache had persisted, probably not as bad, he stated, as before, but it was still present; he stated that it started in the upper neck and radiated up over the top of his head as when previously seen.

He had some pain in the upper dorsal—that is near the base of the neck—and also in the lumbar area.

Examination showed considerable improvement. He did not have any loss of sensation over the shoulder; his muscle power was good; he had increased his range of motion. However, he still com-

(Testimony of Dr. Roderick E. Begg.)

plained of discomfort on extremes of motion in his leg, back and also in the cervical region.

Q. Doctor, assuming that this man was injured on September 26, 1953, according to the history which has previously been related by you; you first saw him in November, 1953, and found the conditions as you have stated; then you saw him a few days ago and examined him again.

Do you have an opinion as to whether or not it is [28] reasonably probable that this man has sustained some permanent injury as a result of this accident?

A. Once these ligaments are badly stretched or torn, it means it leaves a vulnerable place where it can recur; also, these ligaments that are injured do not snug up as tightly and as firmly as they did before, and that might be a probable source of pain, and also a probable source of reinjury.

Q. Then you would state it is reasonably probable there is some permanent injury? A. Yes.

Q. It is reasonably probable his ability to work would be permanently impaired?

A. Impaired to some extent, yes.

Q. Assuming that this man was unable to go back to work from the time of the accident, September 26, 1953, until March 8, 1954, when he did go back to work and took lighter work, what is known as dock work where he did not have to do very much lifting or straining; that he was only able to work one or two or three days a week for the balance of

(Testimony of Dr. Roderick E. Begg.)

March and into April, and by the end of April he got to a point where he was unable to work at all and has not been able to work since that time, although the rest period in this last month has caused him to improve again, of what significance is that, in so far as whether or not he should go back to work or should continue to stay off work while he is improving? [29]

Mr. Brooke: For the record, your Honor, I object to that question because it has to do with matters not before the Court.

Mr. Pozzi: I will connect it up, your Honor.

The Court: Answer the question.

The Witness: Do you wish me to proceed?

The Court: Yes, Doctor.

The Witness: Well, that would be a suggestion, certainly, in the patient's history, that certain types of work might have to be avoided, particularly in this recovery period. The permanency of that cannot be told exactly; it could only be estimated, I do not know as one could make an exact estimate, but it would be indicative that probably he had found lighter work during the period of recovery, and particularly if he improved when he was at rest again, it would point to that fact.

Mr. Pozzi: Perhaps it is impossible for you to answer that. Could you anticipate or estimate, rather, what would be reasonable as to his maximum healing period?

A. In spine injuries we often give them a year;

(Testimony of Dr. Roderick E. Begg.)

often following surgery, following a bad injury, occasionally they will take longer.

Mr. Pozzi: You may inquire. [30]

Cross-Examination

By Mr. Brooke:

Q. Doctor, when you first saw Mr. Potter you made a diagnosis at that time. I did not hear it all, I fear. Would you mind repeating the diagnosis you made?

A. Cervical strain, lumbar strain, and decreased sensation over the top of the left shoulder.

Q. For that condition you recommended heat treatments and massage?

A. Yes, physiotherapy, and Sayre stretchings.

Q. Physiotherapy?

A. And Sayre stretchings.

Q. Did you find any indication of tenseness, muscle tenseness or hypertension in this man?

A. I would not have found any hypertension because that is usually referred to high blood pressure.

Q. What I mean is nervousness or tenseness in the man?

A. Well, not particularly. I found tenderness on the original examination.

Q. Muscle tension, I mean?

A. Not that it made any impression upon me, no.

Q. If this man had a condition of muscle tension and nervousness, could that explain the nerve pain he had across the back of his neck and into his head?

(Testimony of Dr. Roderick E. Begg.)

Would the pressure on the nerve be the result of tightening of the muscles? [31]

A. There is such a thing as a person who is under tension, because the tension is the result of pressure or loss of blood around these nerve roots which will cause some type of pain.

Q. Is that also the case with the nerves in the shoulder where this decreased sensation was found? Would it be caused by muscle tension in that area?

A. Not very well. I have never run onto any type of patient that I have had any contact with who complained of such a thing. I do not recall one.

Q. The nerves could be under pressure as a result of muscle tenseness in the shoulder, could they not?

A. Yes, they could be, only that would come out a little lower in the neck, and we would get less likelihood of specific changes in the nerve due to tension. We are more likely to have it from localized pressure or edema or swelling around the nerve.

Q. In your history you pointed out the man stated to you that he had been injured in the war, when he was hit by a shrapnel in the leg. Did he tell you that he received some disability allowance from the Veterans Administration?

A. I do not recall that I asked him. I would assume if he had been hit by a shell fragment and it had damaged the sciatic nerve he is probably receiving something, but I do not recall specifically asking him about that.

(Testimony of Dr. Roderick E. Begg.)

Q. Did you, during the course of your examination of this [32] man, refer to any of the Veterans Administration medical reports? A. No, sir

Q. As to that injury? A. No.

Q. Or as to his condition as they found it?

A. No, sir.

Q. I notice you said you made your diagnosis of lumbar strain based on the history and your physical findings. What were your physical findings as to that?

A. He showed a decreased amount of range of motion in his back, complained of tenderness on pressure in the muscle areas of the back; also complained of pain on extremes of motion, pain to his low back.

Q. Primarily, those are subjective findings, are they not, Doctor?

A. Partly so, except range of motion probably is not.

Q. That is about the only objective finding, isn't it, Doctor?

A. That is true. Of course, I examined him several months after his injury, too.

Q. There were no fractures or dislocations as evidenced by the X-rays?

A. That is right. If they were present, that would make a far more complicated diagnosis. [33]

Q. I also have it noted here that you told Mr. Pozzi there was edema. Will you explain that?

A. I am not saying here that there was edema.

(Testimony of Dr. Roderick E. Begg.)

That is in explanation of what could produce this type of disability; for instance, decreased sensation as a result of injury.

Q. What does edema mean? A. Swelling.

Q. Increased content of fluid in the tissues per square inch more than normal?

A. Cubic inch, I should say.

Q. When I asked you whether this muscle tension on the nerve might explain—that could be another explanation for the loss of sensation?

A. Well, I certainly never made any diagnosis of tension.

Q. Yes, I understand.

A. So I couldn't quite go along with you on that.

The Court: Do you want the doctor to come back after lunch?

Mr. Brooke: I do not think I have many more questions.

The Court: Five minutes?

Mr. Brooke: Yes, at the most.

Q. You are not sure just exactly what caused the decreased sensation in the left shoulder?

A. From the standpoint of trauma, which this patient had, and we had a history of, I have no history of any anxiety [34] tension, and I do not recall ever seeing a localized area even in that one shoulder, so I am explaining that from my standpoint that was due as a result of this injury that the patient gave me a history of having had, that is, this tearing or stretching of the ligaments and mus-

(Testimony of Dr. Roderick E. Begg.)

cles, or both—it can be one or the other or both, with the resulting scar tissue which was due to occur, or at least edema and swelling, which will attack the insulation on the nerves that come out of that area in the shoulder. It can have a little tingling or numbness, and that can stay for several months until the swelling is entirely out of there.

Q. That will go away eventually?

A. I didn't find it on my last examination.

Q. As to the examination which you made of this man's leg, you say he had no reflex—that the reflexes were normal with the exception of the Achilles reflex on the right, and he had some scar tissue in his leg; nevertheless, the man was able to perform work as a longshoreman without any apparent problem. I think you said that there is some disability here, and you characterized that as small——

A. You mean in his leg?

Q. No, the injury he sustained on this vessel.

Mr. Pozzi: Objection, your Honor. He has not characterized it as small.

Mr. Brooke: I am trying to find out. [35]

Mr. Pozzi: That is vague and indefinite.

The Court: Answer.

A. Well, I don't know as I could use the word "small."

Q. (By Mr. Brooke): I will rephrase that. You said the recovery period may be as much as a year?

A. Yes.

Q. At the end of that time do you believe he will

(Testimony of Dr. Roderick E. Begg.)

be able to go back to work, back to longshoring work? A. I believe so.

Mr. Brooke: That will be all.

(Witness excused.)

(Recess until 1:30 oclock p.m.) [36]

ROY E. POTTER

Libelant, having previously been duly sworn, resumed the stand and further testified as follows:

Direct Examination

(Continued)

By Mr. Pozzi:

Q. Mr. Potter, it is stated in the admitted facts that you earned \$5,410 in the year 1951 from longshoring? A. That is right.

Q. And \$5,182 in the year 1952?

A. That is right.

Q. Was all of that income from longshoring?

A. Yes.

Q. You had no other job outside of longshore work? A. No, that was all.

Q. In 1953, immediately before the accident on September 26, what would your earnings run per month during that time on an average?

A. Well, it was \$3,500 up until September when I got hurt.

Q. You had earned \$3,500 from January of 1953, until the time you were injured? A. Yes.

Q. After you saw Dr. Begg and went back to

(Testimony of Roy E. Potter.)

Coos Bay, what [37] course of treatment was followed, in so far as you were concerned?

A. Neck stretching exercises mostly.

Q. How often did you have those?

A. Every day, six days a week.

Q. You saw the doctor quite regularly up until March when you went back to work, is that right?

A. Well, when I first went back I had to see Dr. Harris, and then the nurse gave me the treatments.

Q. What was the first day after the accident you worked? A. March 8th.

Q. 1954, is that right? A. Yes.

Q. What kind of work did you try to do when you went back? A. Dock work.

Q. Tell the Judge just briefly what kind of work that was.

A. Well, that is hooking up on the dock and slipping loads, and like that, but I only worked two or three days a week. That is all I could take.

Q. Why didn't you work more?

A. Because it bothered me. If I worked three days consecutive I could lay off the rest of the week and start in again Monday.

Q. It bothered you in what way?

A. My back at that time was still bothering me, and my [38] headaches—I still had them.

Q. How is your neck?

A. It is still a little sore but better than it was, though.

Q. You worked two or three days a week the rest of March? A. Yes.

(Testimony of Roy E. Potter.)

Q. Did you work two or three days a week during April? A. Yes, part of the weeks I did.

Q. What happened if you continued to work? You said you worked a part of the week——

A. Well, I think there was two weeks that I only worked two days; the other two, I think it was three days.

Q. How was your condition in April?

A. It was bothering me quite a bit, so I laid off all during the month of May.

Q. Were you getting worse? A. Yes.

Q. So you laid off? A. Yes.

Q. Since you laid off, have you gotten better or worse?

A. I have gotten better since I laid off.

Q. At the present time, let's start with your head: You still have these headaches?

A. I still have them, but they are not as frequent as they were. In other words, I do not have as many since I laid off.

Q. Do you have one at least every day, at least one every [39] day?

A. Sometimes I have two—some days I have two; other days I may not have one.

Q. How long do they last when they come?

A. Sometimes they last an hour or two.

Q. Where do they start?

A. Right back here (indicating), and work up.

Q. By "back here" you have put your hand to the base of your skull? A. That is right.

(Testimony of Roy E. Potter.)

Q. How is your neck? Do you have any pain in your neck now? A. Yes, I do frequently.

Q. I notice for instance, when you turn your head back to the Judge, you turn your body. Does your neck hurt you if you try to do that?

A. Yes, it does.

Q. Where does it hurt? Can you show by placing your hands there?

A. It starts right here (indicating), when I turn, right where my shoulders are, my left shoulder.

Q. Your left shoulder, as I understand, is pretty good now, is that right?

A. It is a lot better since I laid off.

Q. How about your back, the middle or lower part of your [40] back? How has that got along since you laid off?

A. That is better, too. It is coming along. It is just going to take time.

Q. During 1951 and 1952 and up until the time you were hurt, about how many days a week would you average working?

A. In 1951 I worked pretty steady, at least six days a week. Of course, sometimes we might work 4 straight and then be off two or three.

Q. At any rate, you had pretty high earnings during those years, didn't you?

A. Yes, that is right.

Q. You figure about an average of six days a week? A. Right.

Q. You figure about six days a week would be about right? A. Just about right, yes.

(Testimony of Roy E. Potter.)

A. I was going over to see Mr. Girt, the walking boss. [43]

Q. Up on the forepeak?

A. That is right.

Q. Isn't it true, Mr. Potter, you could have stepped from the railing onto the forepeak—excuse me—from the deckload, over the railing on the forepeak?

A. You can't step over it. You have got to step up and get over it.

Q. You could have gone over it?

A. I could have.

Q. From the top of the deckload, on the inshore side, down several feet there is a shelf or ledge, is there not? A. That is right.

Q. How wide is that, approximately?

A. Approximately three foot.

Q. About how high is it?

A. I would say it was five or six foot.

Q. I mean, up from the main deck.

A. You mean up to the top of the deckload?

Q. No, I mean from the main deck up to the shelf or ledge.

A. Well, I would say that was three foot or right close to it.

Q. So it was also possible for you to have stepped from the deckload down to this shelf, down to the main deck, across the main deck and up the ladder?

A. You couldn't step from this deckload down to that. [44]

(Testimony of Roy E. Potter.)

Q. That is a route you could have taken? Is that a route you could have taken?

A. That is a route you could have taken if you want to take a chance on falling into the hatch or something else.

Q. Let me put it this way: Was there a space between the after end of the forepeak and the square of the hatch? A. There is a space, yes.

Q. So you could have stepped from the shelf or ledge down to the main deck?

A. You could have stepped over, maybe.

Q. Yes.

A. But you couldn't step from the deckload.

Q. As I understand it, you have a contention here that there was not any mousing——

A. There was no pin in it, if that is what you mean.

Q. You know what I mean by "mousing"?

A. It was not secured.

Q. Do you know what I mean by "mousing"?

A. I don't know what you are referring to.

Q. Twine wrapped around it.

A. No, there wasn't.

Q. When you went out along this after edge of the forepeak, you couldn't see whether there was any mousing there or not?

A. No. I figured there was a pin in that. I figured it was safe, a safe route to take. There was supposed to have [45] been.

Q. Had you worked this ship before?

A. Yes.

(Testimony of Roy E. Potter.)

Q. When was that?

A. We started down at the pulp mill. I think it was two years ago when I worked it. That was the first time I had worked No. 1 hatch, though.

Q. You had worked this ship before, two years ago, but you had not worked No. 1 hatch?

A. No, just that week when we started at the pulp mill.

Q. That week, then, was not two or three years ago, was it?

A. No, that was the week I got hurt.

Q. Two years ago where did you work on this ship? A. I think it was No. 4 hatch.

Q. When you started to work this ship about a week before, you say you had not worked in No. 1 hatch? A. No, I hadn't.

Q. Had you worked No. 1 hatch at all prior to the morning of this accident? A. No.

Q. That was the first time you had ever worked No. 1 hatch? A. That is right.

Q. That morning? A. Yes.

Q. As I understand it, you stated you were about one foot [46] from this amidships ladder when the rail came out?

A. Approximately one foot. It might have been a foot and a half, but it happened so fast I can't judge it.

Q. Did you try to grab the hand rail of the ladder?

A. I never had a chance, or I would have.

Q. Do you know James White who works for

(Testimony of Roy E. Potter.)

the Independent Stevedoring Company, Jim White?

A. I don't know if I know him or not.

Q. A tall fellow with straight black hair?

A. What does he do for Independent?

Q. I think he is a runner. He brings things out to the ship and back.

A. I know they have about two or three new ones since I was back there.

Q. Do you remember a man who was doing a job on the ship when you were injured?

A. No, I don't recall. They had two or three there at that time, but I don't recall which one brought the gear over.

Q. Do you remember making a statement to one of these men who worked for the Independent Stevedoring Company on the dock immediately after this accident to the effect that, "I guess this will knock some sense into my head"?

A. No. If that was Mr. White, he wanted to know how my head felt.

Q. Do you remember saying that to him? [47]

A. Yes, I remember talking to him.

Q. Do you remember saying that?

A. He just wanted to know how I felt and I told him, "Maybe it will knock some sense into my head," because I got a rap on my head and I was more or less hurt, pretty sore; in other words, it was more or less of a shock when I said that.

Q. You had never worked this ship before, that is, No. 1 hatch, is that right? A. No.

Q. What? A. That is right.

(Testimony of Roy E. Potter.)

Q. Have you ever seen a railing that pulled out with you during the time you worked that was moused or shackled?

A. I never paid any attention to No. 1 hatch when I didn't work it.

Q. So when you talk about the custom of securing the gear on a ship, you are referring not to this particular piece of equipment but just a general custom, isn't that right?

A. Any movable gear on a ship that is not in use is supposed to be secured.

Q. I understand what you say, but you are not referring to this particular equipment because you don't know?

A. Just any gear. In my case I am referring to it, yes.

Q. As a matter of fact, there isn't any custom? You don't know whether there is a custom with respect to this piece of [48] equipment?

Mr. Pozzi: On that ship?

Mr. Brooke: On that ship.

A. Supposed to be secured if not in use.

Q. You are talking generally. I am talking about this piece of equipment, Mr. Potter. You don't know whether that is supposed to be done as to this particular piece of equipment?

A. Yes, it is supposed to be. It is movable.

Q. I understand that, but, I say, with respect to this piece of equipment, you don't know of any custom with respect to this particular railing, not

(Testimony of Roy E. Potter.)

other ships you have worked on but this particular railing?

A. Any of them that had that railing is supposed to be secured. I still maintain that fact.

Q. I think you testified you saw Dr. Harris when you went back to the hospital? A. Yes.

Q. On Tuesday?

A. I saw Dr. Harris on Monday.

Q. You saw Dr. Harris on Monday and you went to the hospital Tuesday? A. Yes.

Q. That is when you were in traction?

A. Yes. [49]

Q. You were in traction three days?

A. I was in there Tuesday, Wednesday, Thursday and Friday, until Friday afternoon.

Mr. Brooke: I thought the hospital records showed only three days.

Mr. Pozzi: No, four.

Mr. Brooke: That is all.

Mr. Pozzi: No further questions. Just a moment, your Honor.

Redirect Examination

By Mr. Pozzi:

Q. You mentioned something about your head getting a rap. Would you tell the Court whether or not some time after the accident you noticed you had a bump on your head?

A. I did have a slight bump.

Q. Where was the bump?

(Testimony of Roy E. Potter.)

A. Right in back here (indicating), where I hit on the deck.

Q. Mr. Brooke has asked you about other ways in which you could have gone, and you said one was where you could have climbed up over this railing. You went a third way. Would you state whether or not that third way appeared safe to you?

A. It looked safe to me.

Mr. Brooke: I object to that as a conclusion of the witness. [50]

The Court: Overruled.

Q. (By Mr. Pozzi): Would you state whether or not that was the shortest distance between you and Mr. Girt, the route you took?

A. Yes, it was, from where I was standing.

Mr. Pozzi: That is all.

Mr. Brooke: No further questions.

(Witness excused.) [51]

E. L. CLARK

produced as a witness on behalf of Libelant, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pozzi:

Q. Where do you live, Mr. Clark?

A. 2715 Broadway, North Bend, Oregon.

Q. How old a man are you? A. 37.

Q. You are a longshoreman by occupation?

A. Yes.

(Testimony of E. L. Clark.)

Q. How many years have you been a longshoreman? A. About 12 years, counting the war.

Q. Counting what? A. War service.

Q. You worked as a longshoreman during the war. That was a Navy unit, is that correct?

A. Yes.

Q. Speak up, Mr. Clark, so the Judge can hear your answers. You are a winch driver, is that right?

A. Yes.

Q. You were the steady winch driver in the same gang Potter worked with? A. Yes.

Q. On the day of the accident you were with the gang on the [52] job? A. Yes.

Q. Do you recall the accident? A. Yes.

Q. The accident happened about 8:30, is that your recollection, in the morning? A. Yes.

Q. Were you on or off the winches for that hour, the first hour? A. I was hatch tender.

Q. That means your partner was driving?

A. Yes.

Q. At the time the accident happened, where were you standing, or where were you?

A. I was on the forepeak.

Q. I am going to hand you Respondents' Exhibit No. 6-D, which is a blown-up photograph and which shows—I guess that is the walking boss. Could you hold that up and show the Judge where you were standing when the accident happened? Could you put your finger on it?

A. Right here, about four feet from him.

Q. Four feet from Potter?

(Testimony of E. L. Clark.)

A. From the libelant.

Q. Would you state whether or not you saw Mr. Potter fall?

A. Yes. I was watching him come across [53] there.

Q. Do you know why he was coming across?

A. To see Marvin, to ask Marvin something about the marking off—I don't think he understood it or else he was coming over to get a clarification.

Q. Tell the Judge in your own words what you saw when Mr. Potter fell; tell the Judge what you observed about how it happened.

A. Well, he was coming across there and it looked to me like he was sliding one foot behind the other one and hanging onto that railing. When he got almost to the ladder that hook came out and he went right over backwards.

Q. Did you see him land, when he hit the deck?

A. I am not quite sure. I went down the ladder as fast as I could.

Q. When he fell backwards, did you see his body fall down to the deck? A. Yes.

Q. Would you state whether or not there was any gear down there that he landed on?

A. There was some peaveys laying there.

Q. Did you see in what position his body contacted the deck? Was it the way described by the libelant, that he landed on his head and neck and the upper part, as he fell backwards? Is that about right? A. Yes. [54]

Q. The way you saw it? A. Yes.

(Testimony of E. L. Clark.)

Q. You say you went down the ladder. What did you do when you got down the ladder?

A. Helped him up.

Q. When you first got to him, how did he appear to you to be?

A. I figured he was hurt pretty bad. He was kind of in a daze or something.

Q. What did you do with him when you got him up on his feet?

A. I helped him up that ladder.

Q. You are the man who helped him up the ladder, is that right? A. Yes.

Q. After you helped him up the ladder, then what happened?

A. We all told him he had better go to the hospital and get X-rayed.

Q. Did you stay on the job? A. Yes.

Q. Do you know Mr. Fertig? A. Yes.

Q. Was he the gang steward? A. Yes.

Q. Do you know whether or not Mr. Fertig made an inspection of the railing? [55]

A. After he had picked on there with his hook, there was a hole.

Q. Pardon?

A. There was a hole in the hook, after he dug out part of the paint.

Q. Will you state whether or not that hole was painted over before Mr. Fertig started digging it out? A. That is what he dug out.

Q. He dug out part of the paint? A. Yes.

Q. Was there any pin in there? A. No.

(Testimony of E. L. Clark.)

Q. Was there any cotter key in there?

A. No.

Q. Was there any shackle or anything—in the eye of the hook, I am referring to? A. No.

Q. Was there any mousing—you know what I mean by “mousing”? A. Yes.

Q. Was there any mousing around the end of the hook or near the end of the hook? A. No.

Q. It is stipulated that the rail was three-quarters of an inch in diameter. I am handing you Respondents' Exhibit 6-D. If a mousing were properly put on there in order to prevent [56] the hook from pulling off, would the mousing show from up above?

A. It probably would not. It might be underneath that eye.

Q. If the mousing were put down on the point of the hook, would that hold it, down on the end of it? A. If it were put on there properly.

Q. If it were put through the hole, it would, is that right? But if it was just wrapped around one end of the hook, would that keep the hook from falling out?

A. If it was put on there properly, it probably would.

Q. If it was put on tightly? A. Yes.

Q. Your gang went to work at 8:00 o'clock that morning. Had that railing been in the same position all the time you worked before he was hurt?

A. As far as I know, yes.

Q. You were up on the forepeak tending hatch, is that correct? A. Yes.

(Testimony of E. L. Clark.)

Q. The railing would be right in front of you all the time? A. Yes.

Q. Had any longshoremen done any work with that railing in any way before this man was hurt?

A. No.

Mr. Pozzi: You may inquire. [57]

Cross-Examination

By Mr. Brooke:

Q. I understand Mr. Potter had a cargo hook in his pocket that was bent? A. Yes.

Q. Did he have that in his pocket?

A. Yes.

Q. Which pocket?

A. I believe it would be the right one.

Q. His back pocket? A. Yes.

Q. Back here? A. Yes.

Q. As I understand your testimony, when Mr. Fertig took his cargo hook and dug out the paint on one part of this hook, he found the eye?

A. Yes.

Q. Is that right? A. Yes.

(Witness excused.) [58]

MARY POTTER

produced as a witness on behalf of Libelant, and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pozzi:

Q. You are the wife, of course, of Roy E. Potter? A. Yes.

Q. You have two children?

A. I have five altogether.

Q. But you and Roy have two children, ages seven and four? A. That is right.

Q. Children of your own? A. Yes.

Q. Do you recall the day Roy was hurt?

A. Yes.

Q. What time did he get home that day?

A. About 1:00 o'clock.

Q. What was his condition when you saw him at 1:00 o'clock? What did you observe?

A. His condition was very bad. He couldn't hardly stand up. They had to help him in the house.

Q. How did you get him in bed?

A. Well, I undressed him and put him to bed.

Q. Did he make any complaints to you of any pain at that time? [59]

A. Yes, he complained his head hurt; he had a great big lump on the back of his head and his back and his shoulder hurt, he said.

Q. Before the accident, Mrs. Potter, what condition of health did your husband enjoy before the accident? A. Very good.

(Testimony of Mary Potter.)

Q. Was he a steady worker? A. Yes.

Q. Before the accident had he ever complained about back pain or neck pain or headaches?

A. No, he didn't.

Q. Mrs. Potter, after Roy got out of the hospital, where he was taking these treatments and started working in March of this year, taking jobs on the dock, when he would come home from work at night, what kind of shape was he in?

A. Not very good. Lots of nights he would come home to eat his supper—sometimes he wouldn't even eat hardly anything but he would go to bed.

Q. How about sleeping at night?

A. He didn't sleep very good. Lots of nights I would have to get up and rub his back and get the heating pad and put on it.

Mr. Pozzi: You may inquire. [60]

Cross-Examination

By Mr. Brooke:

Q. After this accident, when you rubbed his back and got the heating pad, did you find the muscles of his back were tight, that there was any tenseness in his back? A. Well, no.

Mr. Pozzi: I don't believe she can answer that. She is not a medical witness.

Q. (By Mr. Brooke): You say, "Well, no." What do you mean?

A. Well, I don't know just how to answer. Lots of times it would help things some when I would rub it and put the heating pad on.

(Testimony of Mary Potter.)

Q. What I was wondering about was whether the muscles were tight, as if pulling. Did you notice that when you rubbed his back? A. No.

Q. You noticed that at no time?

A. No, I have not.

Mr. Brooke: That is all.

Mr. Pozzi: That is all.

(Witness excused.)

Mr. Pozzi: Libelant rests subject to the production of the Keizer Hospital records.

Mr. Brooke: The respondent is ready to proceed, your [61] Honor.

Respondents' Testimony

WILLIAM J. HAROLD, JR.

produced as a witness on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Brooke:

Q. I have handed you the various exhibits that have been admitted in evidence in this case; during the course of your testimony, if you would like to refer to them, you may.

What is your name?

A. William J. Harold, Jr.

Q. Your address? A. Oswego, Oregon.

(Testimony of William J. Harold, Jr.)

Q. What is your occupation?

A. Supercargo.

Q. What is the nature of your work?

A. The control of the loading of cargo aboard a vessel.

Q. How long have you been engaged in that?

A. Ten years as supercargo.

Q. Had you worked ships prior to that time?

A. Yes, I started on the waterfront in 1933.

Q. In what capacity? [62] A. Sailor.

Q. Are you familiar with the vessel S.S. Romulus that Mr. Potter was injured on? A. Yes.

Q. Have you ever worked that ship as supercargo?

A. Yes, I have worked it numerous times.

Q. Approximately how many times?

A. I would say 17 or 18 times.

Q. Were you on the vessel the day Mr. Potter was injured? A. Yes.

Q. The vessel was in North Bend at the time?

A. North Bend, at the City dock.

Q. Where were you immediately prior to the accident?

A. I was in the supercargo's office amidships.

Q. Did you hear about the accident shortly after that? A. Yes.

Q. What did you do?

A. I walked out there to see what I could see. I went no further than the bridge.

Q. Tell the Court what was the general nature

(Testimony of William J. Harold, Jr.)

of the cargo at the site of the accident, how it was stowed, and so forth.

A. Both wings forward as well as on deck, approximately six-foot capacity—six foot six inches—the cargo was stowed to a height of six foot with the exception of three feet from the hatch coaming, and cargo at that time was stowed three [63] feet from the deck——

Q. You are referring now to the forepeak load, I understand. On the inshore side of that forepeak load there was a projection coming out from the main deck three feet high, approximately three feet high, and about three feet wide?

A. On the offshore, not inshore.

Q. However, from the top of the deckload to this shelf or projection was about three feet or three and a half feet? A. Yes.

Q. With the deckload approximately abutting up against the after end of the forepeak on the port side?

A. Very close to it, yes, just a matter of inches.

Q. Did you learn how this accident happened to Mr. Potter?

A. Yes; not through Mr. Potter, no.

Q. In any event, you learned how it happened, did you not? A. Yes, sir; I did.

Q. Did you learn that while he was sidestepping along the outside edge of the forepeak, that when he arrived to the section of the railing immediately adjacent to the ladder, that big section came out?

A. Yes.

(Testimony of William J. Harold, Jr.)

Mr. Pozzi: Object to that as hearsay.

Mr. Brooke: Is there any question about that?

Mr. Pozzi: You and I entered into a stipulation and it is part of the agreed facts. [64]

Mr. Brooke: I am trying to find out if he learned that is how the accident happened.

Mr. Pozzi: He said he didn't learn it from Potter.

Q. (By Mr. Brooke): You are familiar with the section of the railing on the after edge of the forepeak immediately adjacent to the amidships ladder, are you not? A. Yes.

Q. Will you describe, in general, that section for the Court? A. It is a set of rails——

Q. Maybe the sketch which has been drawn will serve the purpose. I refer to Respondents' Exhibit No. 9. Does that illustrate the situation?

A. Yes, it illustrates it to me.

Q. I am referring to the railing which is immediately to the left of the ladder shown in the sketch. Does that give a fair representation of the way the forepeak railing is?

A. To the best of my recollection, yes.

Q. Is that also true with respect to Respondents' Exhibit No. 6-D? A. That is true.

Q. In Respondents' Exhibit No. 6-D it appears as if that railing can be removed or that it is a movable railing. As to the section immediately adjacent to the ladder, do you know that to be a fact, that it is a movable section? [65]

A. Yes, it is.

(Testimony of William J. Harold, Jr.)

Q. What is the reason for that?

A. It is to bring the mooring lines down to the deck.

Q. What is that?

A. To bring the mooring lines down.

Q. I do not understand the reason for the removal of the section. I ask you this: Isn't it true sometimes the lines run from up forward down to No. 1 hatch, to the winches for No. 1 hatch?

A. That is right.

Q. That was the reason why this particular section had been a removable section?

A. That is the way it was constructed; that is why it was constructed that way.

Q. Is there any other section of the railing of that forepeak that also is a removable section, movable? By that, I mean on the other side of the ladder? A. To the best of my knowledge, no.

Q. You do not think there is one on each side of the ladder? A. No.

Q. Is there one maybe two sections away from the ladder? A. No.

Q. I don't know whether the picture will show that or not. I think, as a matter of fact, it does.

A. I never noticed it removed. [66]

Q. After examining these pictures, have you refreshed your memory on that point?

A. I can't remember ever having seen this removed.

Q. During the time you worked this ship—as I understand, 17 or 18 times—had you ever seen any-

(Testimony of William J. Harold, Jr.)

one walking along the after edge of this railing as Mr. Potter did when he was injured?

Mr. Pozzi: Objection, your Honor.

The Court: Overruled.

Q. (By Mr. Brooke): Had you ever seen anyone do that before?

A. Not to my recollection, no.

Q. After this accident, did you go up on the forepeak and examine the hook and eye, the eye in which the hook was inserted in this railing? Some time afterward did you do that?

A. Some time after the accident I went on the forepeak and took a look at the rails involved and looked at it.

Q. What is that? A. And just looked.

Q. Tell the Court how the hook and eye fit.

A. Well, the hook was about, I would say, three inches long, maybe better, and it fit into an eye and the point of the hook came down at least an inch and probably better, an inch or an inch and a half, I would say.

Q. How did the hook fit in the eye with respect to being loose or otherwise? [67]

A. When I saw these rails, the top part of the hook had reached the sides of the hole and was fitting into the hole.

Q. Did it appear to be a tight fit?

A. Then I would say it appeared to be tight.

Q. From the place where Mr. Potter was standing, that is, on the forward part, on top of the deckload, what was a route he could have taken to

(Testimony of William J. Harold, Jr.)

get up on the forepeak, just in front of the emergency ladder on the forepeak?

A. Well, he could have stepped down onto the wharfway and walked up the ladder.

Q. Walked across the main deck and up the ladder? A. Yes.

Q. What was another route he could have taken?

A. Well, he could have walked from where he stepped over the rail directly ahead.

Q. Did you ever see any men fall in going that way while you have worked these ships?

A. I can't say that I have, no. I have seen men step down from deckloads.

Q. That is very common?

A. And I have seen men step over the rail, but on this particular ship I can't say yes or no.

Q. These procedures you have seen are common in working deckloads, are they not?

A. I would say yes. [68]

Mr. Brooke: That is all.

Cross-Examination

By Mr. Pozzi:

Q. You had not looked at the removable portion of that railing prior to the accident?

A. No, sir.

Q. Incidentally, you worked directly for the ship at the time of the accident?

A. I was working for the ship's broker.

Q. The ship's agent? A. Yes.

(Testimony of William J. Harold, Jr.)

Q. You were not an employee of the stevedoring company? A. No, sir.

Q. In response to a somewhat leading question by Mr. Brooke, you said when you got there you looked at the hook and it appeared to be a tight fit. I assume what you meant was that any time something fits like that, if it is bigger on top, from looking down on it it would appear to be tight?

A. Yes, I imagine the top side hooked on it.

Q. You don't know whether it was like that at the time of the accident, do you? A. No.

Q. Had you tested it to see that it fit?

A. No. [69]

Q. These pictures demonstrate there is quite a sharp taper to that hook end. Did you notice that?

A. Yes.

Q. Isn't it true if there is a sharp taper like that that lots of times the rail will turn? In other words, there doesn't have to be much motion in it before it will turn?

A. It would have to be, but I never tried it.

Q. I understand you used to be a sailor?

A. Yes.

Q. Haven't you ever seen that happen?

A. I have never seen that on a ship I sailed.

Q. You have not?

A. American ships ordinarily have solid rails with removable sections.

Q. You mean a solid top where you lift the stanchions right out, when you take the whole rail section down?

(Testimony of William J. Harold, Jr.)

A. Yes, when you take the whole rail section down.

Q. You heard the testimony about an eye in the end of the hook. What was the purpose of that eye in the end of the hook?

Mr. Brooke: I object to that, your Honor.

Mr. Pozzi: You asked him a lot of other questions about that.

The Court: He may answer.

A. I don't understand what you mean by "in the end of the hook." [70]

Q. (By Mr. Pozzi): In the end of this hook, near the end—I think Mr. Brooke asked you about that. There is testimony there is a little hole through the hook end. In other words, here is a hook and there is a hole through there. What is the purpose of that hole?

A. The purpose of it is to put a cotter key in there to keep the rails secure.

Q. You used to sail on ships and you have worked on them a lot as a checker and supercargo. When railings are not being used, then they are secured in some manner? A. Yes.

Q. When they are left there? A. Yes.

Q. In this particular case you assume that hole was to put a cotter key or shackle in?

A. I would assume that.

Q. The purpose would be to prevent it from pulling out, would it not, or holding it down?

A. Yes.

Q. Referring to Respondents' Exhibit 6-H, un-

(Testimony of William J. Harold, Jr.)

derneath that railing there is what appears to be—
what do you call that device? Is that a chock?

A. That is a chock.

Q. What is the purpose of that?

A. It is to take the strain of the rope leading to
that winch, [71] the winches on No. 1.

Q. You will note a line here, a rope going down
to the deck and out to the spring lines. Is that cor-
rect?

A. Yes.

Q. Isn't that what that chock is for?

A. The chock is also leading off these winches.

Q. It was also used for that? A. Yes.

Q. But it is used for these lines, too?

A. Yes, it could be used for those off over here
(indicating).

Q. You have testified the reason for removing the
railing is to stretch the lines through to the winch?

A. That is the reason that section is made re-
movable.

Q. Isn't that chock directly under the rail?

A. Yes, but the chock won't hold a line that is
bound around.

Redirect Examination

By Mr. Brooke:

Q. Mr. Pozzi discussed with you the fact that
there is a little hole at the end of the hook, and you
felt it probably was there for the purpose of hold-
ing a key.

Mr. Pozzi: I object. He didn't say that he felt
anything. He said the purpose was for a cotter key.

(Testimony of William J. Harold, Jr.)

Q. (By Mr. Brooke): You can only assume that? A. I would assume that. [72]

Q. Assume the hole is completely painted over with several coats of paint, so that it no longer exists, you can no longer make that assumption? You cannot make that assumption?

A. No, I couldn't tell you.

Q. Assume that there was a hole there—and I assume there was—for the purpose of keeping the rail secure, if it was painted over—and it has been painted over for some time—you cannot make that assumption, can you? A. Right. I can't.

Q. Mr. Pozzi has asked you some questions about this hook, the general tenor of which was that the end of the hook had a severe taper. I think he referred, in asking the questions, to Libelant's Exhibit No. 1-B. That picture does not reflect any severe taper, does it? A. No.

Mr. Brooke: That is all.

(Witness excused.) [73]

MARVIN GIRT

produced as a witness on behalf of Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Brooke:

Q. Your name is Marvin Girt and you live in Coos Bay or Empire? A. Empire.

(Testimony of Marvin Girt.)

Q. Down by Coos Bay? A. Yes.

Q. You work as walking boss for the Independent Stevedoring Company, is that correct?

A. Yes, sir; I do.

Q. How long have you been a longshoreman?

A. I started in 1935; from then on, except when I quit during the war.

Q. When did you become a walking boss?

A. In January, 1949.

Q. Were you walking boss for the Independent Stevedoring Company on the day Mr. Potter was injured? A. Yes, I was.

Q. Where were you standing at the time of the injury?

A. I was standing amidships on the forepeak forward, just ahead of the ladder.

Q. From where you were standing to the deck-load, where [74] Mr. Potter was standing immediately before his injury, you were about 10 feet away, is that right? A. Right.

Q. Had you worked on the S.S. Romulus before? A. Yes.

Q. Approximately how many times have you worked that ship?

A. Three years as a longshoreman and walking boss combined, approximately 14 or 15 times.

Q. As Mr. Potter was walking along, he came to the section immediately to the port side of the ladder amidships, when the railing came out, is that right? A. Yes, sir.

(Testimony of Marvin Girt.)

Q. Describe how the accident happened, in your own words.

A. He stepped from the deckload to, I will call it the forecastle, which is the forepeak, and hand over hand along the railing. When he got approximately in the middle of the railing, or closer to the ladder, the railing came out of the socket end he went over backwards.

Q. Did he hold onto the railing after it came out of the socket? A. Momentarily is all.

Q. Then he let go of it?

A. He let go of it, yes.

Q. How did he fall?

A. Backwards, and lit on his hip. [75]

Q. Then what did he do?

A. Tipped back and hit his head.

Q. Was he knocked out? A. No, sir.

Q. What did he do after that?

A. Well, he laid there a while and I started down the ladder to where he was, because I figured the man was hurt worse than what it looked like right then. He laid there for a few seconds before he got up. Of course, the first thing you ask a man is, "Are you hurt?" And Roy said, "I don't think so," which could mean anything at the time.

Q. Did he get up then? Did he go up the ladder?

A. He got up—I can't remember helping him up there, but we ended up talking about it up on the forecastle.

Q. Where you had been standing before the accident? A. Yes.

(Testimony of Marvin Girt.)

Q. Do you have the large pictures there before you? A. Yes.

Q. I think it shows in the large pictures that there is a hand railing along each side of the ladder so that when you climb up the ladder you have something to hold onto? A. Yes.

Q. Was that the situation at the time of the accident?

Mr. Pozzi: That is stipulated.

Mr. Brooke: All right. [76]

Q. How long did Mr. Potter remain up there on the forepeak with you before he left the ship?

A. Well, I was there—I had the whole ship to watch. I would say he stayed there approximately 15 or 20 minutes. From there I don't know where he went because I went back and made out a report right then on it, the usual report that we make.

Q. Did you see him later? A. Yes.

Q. After you had finished your report?

A. Yes.

Q. Where was he?

A. Well, he was still aboard ship. That is when he left and went up to the hall to get his report made.

Q. About how long after the accident did he leave to go up to the hall?

A. Oh, I would say approximately an hour.

Q. After he left, of course, you kept on working the ship. Did he return to the ship later on that day? A. Yes, he did.

Q. When was that?

(Testimony of Marvin Girt.)

A. Around 11:00 o'clock I remember he was down there.

Q. Did he tell you at that time he could not work the shift?

A. He told me he was going to be back up for a check-up or something at the hospital, which I said was a very good idea, [77] to go in and find out what was the matter.

Q. Then he left again, is that right?

A. Yes.

Q. Did you see him any more the rest of that day?

A. No. The gang finished the ship that day.

Q. This railing that pulled out—did you see that happen? A. I seen it happen.

Q. You were looking at Mr. Potter when it happened?

A. That is right. I was very close to him when it happened.

Q. How did the railing come out, in what direction? A. Straight out.

Q. Then it fell to the side when he lit?

A. It fell back, yes. Most of his body went the same way; he fell back.

Q. Do you know whether or not Mr. Potter landed on top of any gear down there, or how did he land?

A. There was gear on the deck, but I am pretty sure he lit flush on the deck.

Q. This section that pulled out when Mr. Potter was walking along the after edge of the forepeak,

(Testimony of Marvin Girt.)

or forecastle, do you know why that is a removable section?

A. Well, it was built that way for the mooring lines, in case of an emergency, to use the No. 1 winches. It was built that way by the original builders.

Mr. Pozzi: I move to strike that answer as hearsay. [78]

The Court: Overruled.

Q. (By Mr. Brooke): Did you know prior to this accident that this was a removable section?

A. Well, yes.

Q. This section of railing, as I understand it, goes along and then there is a bend in the railing and what we call a hook which is inserted over an eye which is in the top of the stanchion, and that holds the railing in place. Is that generally correct?

A. Right.

Q. Did you see Mr. Fertig pick out the paint, so that this little eye was found in the end of the hook?

A. No, I wasn't present.

Q. Did you see that little hole or eye in the end of the hook after Mr. Fertig inspected it?

A. Afterwards, yes.

Q. Could you tell the Court in your best judgment how many coats of paint had been painted over that eye?

A. Numerous coats; maybe eight or nine coats, or ten.

Q. During the time you have worked this ship, state whether or not you have ever seen any other

(Testimony of Marvin Girt.)

longshoremen walk along the after edge of the fore-castle.

Mr. Pozzi: Objected to as irrelevant.

The Court: Overruled.

A. I can't remember whether—I can't say yes or no. [79]

Q. To the best of your recollection, have you ever seen anybody do that before?

Mr. Pozzi: Objection, your Honor.

The Court: Overruled. Answer the question. Hurry on.

A. No.

Q. (By Mr. Brooke): After the accident was the railing put back in place? A. Yes.

Q. To your knowledge, was there any mousing or cotter pin or other instrument put on there to hold it in place? A. Not immediately.

Q. When you say that, you mean immediately afterwards, and you didn't see anything done to it?

A. That is right.

Q. During the time you had worked this ship before, had you ever seen anything done to secure that railing in place while the ship was being worked? A. No, I never observed it.

Q. After the accident, did you go up on the fore-peak and make a check as to what force it would take to pull that railing out of the eye? Did you or did you not? A. Yes.

Q. Will you explain to the Court what you found?

(Testimony of Marvin Girt.)

A. Well, I found that it had to be pulled straight out.

Q. Before the railing would come out? [80]

A. Yes.

Q. What was the effect of a lateral force against the railing? A. Well, it would stay.

Q. The railing would stay in place with a lateral force exerted? A. Yes.

Q. State whether or not at different times you have seen men in the position Mr. Potter was going from that position onto the forepeak? Have you ever seen that done while working that ship or similar ships, any similar situations on other ships?

A. Yes.

Q. Which route did you see them follow?

A. I have seen them go all ways.

Q. Would one of the ways be from the top of the deckload down to this wharf or ledge?

A. Yes.

Q. Would another way have been up over the railing onto the forepeak? A. Yes.

Q. That was a direct route to where you were, was it not? A. Yes.

Q. Is it not true that Mr. Potter, after sidestepping along the after edge of this railing, would have had to have climbed [81] over the hand rail and ladder before he got up to where you were or stepped up in front of you?

A. If he intended to come clear over onto the forecastle.

(Testimony of Marvin Girt.)

Q. He testified he did. A. He did?

Mr. Pozzi: No, he did not.

Mr. Brooke: I asked him that question.

Mr. Pozzi: He said he was coming over to this spot.

Mr. Brooke: This hook of the railing, the part that is inserted through the eye to hold it in place, state whether or not there was any taper, to your knowledge, in the hook, towards the end of the hook, or was it the same diameter all the way through?

A. To my knowledge, it was approximately three-quarters of an inch the full length of the hook which was three inches long.

Q. Approximately three inches long?

A. Yes.

Q. I think I asked Mr. Harold this: Do you recall whether or not there was also a removable section of this guard railing on the other side of the midships ladder?

A. I am very certain there was. It was further from the midships ladder, though.

Q. I think it was one section over. The hook on this railing that pulled out, that was inserted into the eye, when you [82] examined that, did it appear to be a snug fit? A. Yes.

Mr. Brooke: That is all the questions I have.

(Testimony of Marvin Girt.)

Cross-Examination

By Mr. Pozzi:

Q. Had you ever observed, prior to the time of the accident, this particular rail being out of the eye? A. No.

Q. This was the only occasion you ever had to see that rail out, at the time of this accident?

A. Yes.

Q. When railings are in place on a ship and not in use, they are always secured, aren't they, so that they won't come out?

A. Various devices are used.

Q. There are different devices used?

A. That is right.

Q. You see some with shackles, some shackled, or see them moused off or tied off with twine. You have seen that? A. Yes.

Q. And you have seen them with cotter keys, a kind of a heavy cotter key device used. Have you seen them? A. Yes.

Q. Had you looked at that hook-and-eye device on the railing before the accident happened? Had you inspected it? [83] A. No.

Q. At the time the accident happened where were you looking at the moment the hook pulled loose from the eye? A. I was looking aft.

Q. At whom were you looking or at what were you looking?

A. Well, we were talking and I remember I told

(Testimony of Marvin Girt.)

Roy—he was the acting gang boss that day—something about the lumber, and he had started over to talk to me.

Q. He was somewhat at a diagonal from you, and you said something to him, is that right?

A. That is right.

Q. And when you said that, then he started over to you? A. That is right.

Q. Is that right? A. Yes.

Q. At the moment he fell, you say you were looking aft. At what were you looking?

A. I don't know, but I was just looking. He was in my vision and I seen it happen.

Q. You saw the upper part of his body, his face?

A. I saw all his body through the railing.

Q. What I am getting at is this: Were you looking at the eye in the hook at the moment the accident happened? Were you looking at that?

A. No. [84]

Q. Isn't it true you were looking at Mr. Potter himself?

A. Well, I remember he was in my vision. I don't know whether I was looking at him personally or not.

Q. You recall his being there and you saw him start to go over backwards? A. That is right.

Q. You say Mr. Potter was not knocked out. When you say that, isn't it true that what you are saying is that, as you observed him, you did not think he was unconscious? A. That is right.

Q. That is what you mean?

(Testimony of Marvin Girt.)

A. That is what I was looking for, to see if he was.

Q. You realize sometimes people can talk and walk about and do everything else and still be out, or do you realize that?

A. I didn't realize it then, no.

Q. You say that little eye in the hook had eight or nine coats of paint in it. How did you determine it had been painted over?

A. By examining it after the accident happened.

Q. Did you examine each coat of paint and count them all? A. No, I said approximately.

Q. Isn't it true it just appeared to have been painted at least more than a couple of times?

A. Yes, sir.

Q. This, of course, was ship's paint? It is heavy paint, [85] isn't it? A. It is heavy enamel.

Q. You do not know whether, at the moment the accident happened, the hook end was down tight into the eye or not, do you, because you had not looked at it before the accident; you had not inspected it?

A. The only way I have to tell is by the way the paint broke loose, when we examined it after the accident happened.

Q. You don't know whether or not the paint was broken loose then or at some other time?

A. Or before, no.

Mr. Pozzi: That is all.

(Testimony of Marvin Girt.)

Redirect Examination

By Mr. Brooke:

Q. I think this is irrelevant, perhaps, but for the record, could you tell the Court from your experience what would be the purpose of this guard railing?

A. It was for the purpose of protecting the men from falling off the forecastle when they were working there—I should say, sailors working there at sea; also when a man was walking along the forecastle, a longshoreman or sailor, to keep him from falling off the forecastle onto the main deck, in case they would fall sideways.

Q. I think I am right when I say you testified the railing [86] would serve that purpose?

A. Yes.

Mr. Brooke: No other questions.

Recross-Examination

By Mr. Pozzi:

Q. You worked a good many years as a longshoreman. You have walked rails, haven't you, walked the edges? A. Yes.

Q. You have to do it a lot of times in your work?

A. Yes.

Q. And you always expect them to be secure, don't you? A. Yes.

Mr. Pozzi: That is all.

(Testimony of Marvin Girt.)

Redirect Examination

By Mr. Brooke:

Q. When you say you walk the edges, what do you mean by that?

A. Out on the edge lots of times. A longshoreman, lots of times, if a chain or something is fouled, he will walk along the edge of the ship, along the railing.

Q. Trusting the rail will hold him from falling over? A. Yes.

Q. This rail would serve that purpose, would it not? [87] A. Yes.

Mr. Brooke: That is all.

(Witness excused.)

Mr. Brooke: The respondents rest. We are not going to call our doctor.

Mr. Pozzi: I don't think we need to put on any rebuttal. The libelant rests with the exception of the production of the hospital records. [88]

June 15, 1954

(Court reconvened at 10:00 o'clock a.m., pursuant to adjournment.)

MRS. BETTY GREENWALD

produced as a witness on behalf of Libelant, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pozzi:

Q. Mrs. Greenwald, you are the custodian of the hospital records at the Keizer Memorial Hospital in North Bend, Oregon? A. Yes, I am.

Q. Your position, I believe, is that of Assistant Superintendent of the hospital? A. Yes.

Q. Pursuant to a subpoena, did you bring with you the hospital records pertaining to the libelant in this case, Roy E. Potter? A. Yes, sir; I did.

Q. They have been identified, I believe, as Libelant's Exhibits 3-A and 3-B. Were those records kept in the regular course of business at the hospital?

A. Yes.

Q. Do they cover the period set forth in the subpoena, from September 28th until the 1st day of October, 1953? A. Yes. [89]

Mr. Pozzi: We will offer Libelant's Exhibits 3-A and 3-B for Identification in evidence.

Mr. Brooke: I have not seen the records as yet, but I will object to anything in these records which contains conclusions by doctors or diagnoses, as being conclusions or opinions of the doctors, con-

(Testimony of Mrs. Betty Greenwald.)

cerning which I have had no opportunity to cross-examine or look into.

The Court: They may be received subject to the objection. Any cross-examination?

Mr. Brooke: No cross-examination.

(Witness excused.)

[Endorsed]: Filed September 17, 1954. [90]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Libel in rem and in personam with foreign attachment; Claim of vessel; Stipulation to abide the decree and for costs; Notice of general appearance; Answer; Pre-trial order; Memorandum of court; Findings of fact and conclusions of law; Decree; Notice of appeal; Petition for appeal and order allowing appeal; Citation on appeal; Assignment of error; Designation of parts of apostles; Order to forward exhibits to Court of Appeals, and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7202, in which Wiel and Amundsen,

A/S, as claimant of the S.S. Romulus is the respondent and appellant, and Roy E. Potter is the libelant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith a duplicate transcript of proceedings, June 8 and 15, 1954, filed in this office in this cause. Under separate cover there is being forwarded Libelant's Exhibits 1-A to H, inc.; 1-J, -2, 3-A and 3-B; and Respondent's Exhibits 4, 5, 6-A to -I, inc.; 7-B, 8 and 9.

I further certify that the cost of filing the notice of appeal is \$5.00 and that the same has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District this 23rd day of September, 1954.

[Seal] /s/ F. L. BUCK,
Acting Clerk.

[Endorsed]: No. 14,527. United States Court of Appeals for the Ninth Circuit. Wiel and Amundsen, A/S, as Claimant of the S.S. Romulus, Appellant, vs. Roy E. Potter, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed September 25, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14527

WIEL AND AMUNDSEN, A/S, Claimant of
the S.S. ROMULUS, Her Engines, etc., and
Respondents,

Appellant,

vs.

ROY E. POTTER, Libellant,

Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Appellant adopts as points on appeal the Assignments of Error included in the Apostles on Appeal on file herein.

Appellant designates for printing the entire Apostles on Appeal as designated by Appellant on file herein, except, pursuant to the stipulation on file herein, none of the exhibits, with the exception of Exhibits 1-B, 1-F, 6-D, 6-H and 9, need be printed. Appellant designates for printing Exhibits 1-B, 1-F, 6-D, 6-H and 9 only. The remaining exhibits may be considered by the Court in their original form.

Dated: October 6, 1954.

/s/ LOFTON L. TATUM,
Of Proctors for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed October 7, 1954.

[Title of Court of Appeals and Cause.]

STIPULATION AS TO EXHIBITS

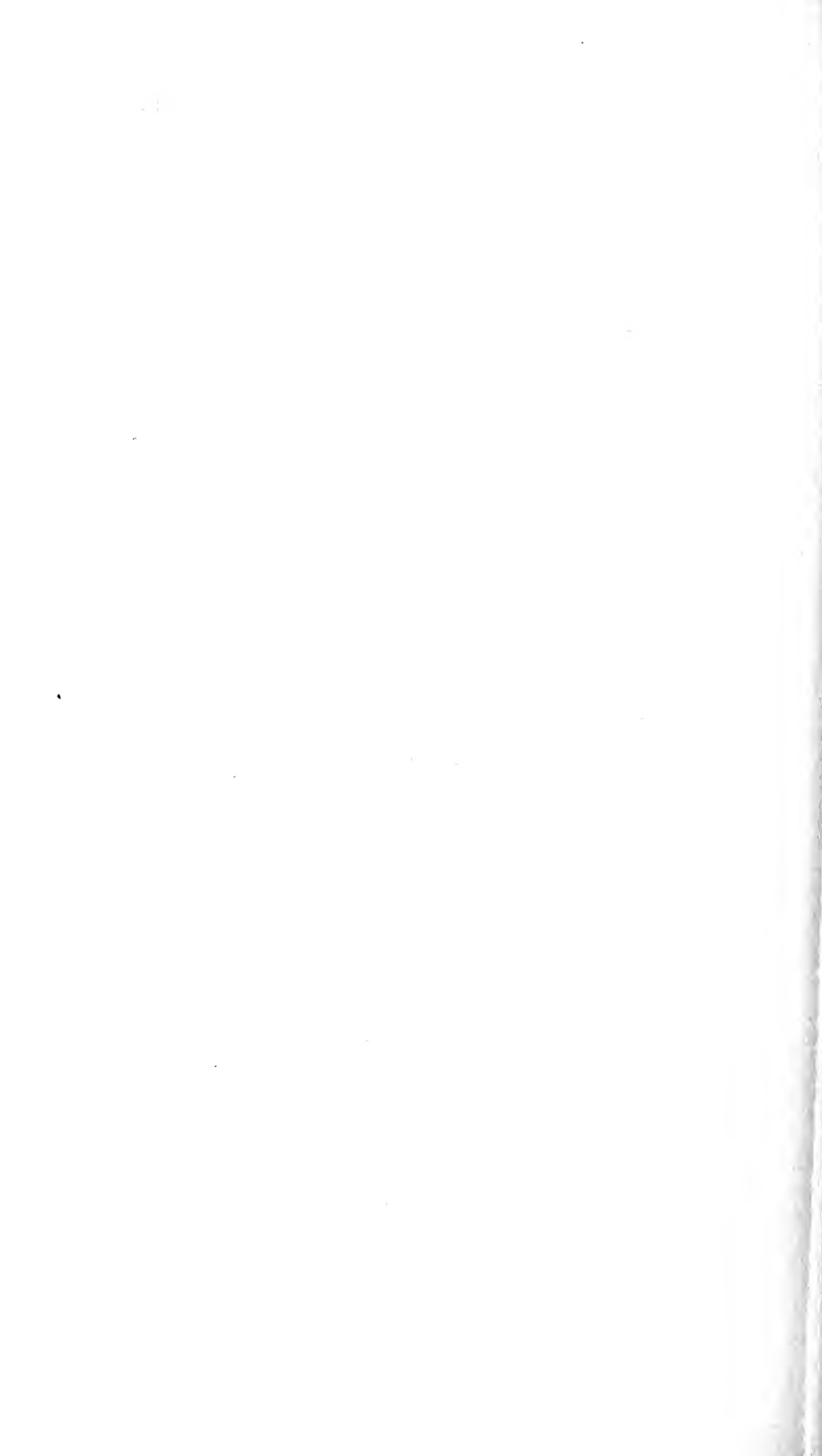
It Is Hereby Stipulated and Agreed by and between Appellant and Appellee, acting by and through their respective proctors, that only Exhibits 1-B, 1-F, 6-D, 6-H and 9 need be printed and that all other exhibits admitted in evidence at the trial may be considered in their original form.

Dated: October 6, 1954.

/s/ LOFTON L. TATUM,
Of Proctors for Appellant.

/s/ FRANK H. POZZI,
Of Proctors for Appellee.

[Endorsed]: Filed October 7, 1954.



United States
COURT OF APPEALS
for the Ninth Circuit

WIEL AND AMUNDSEN, A/S,
as claimant of the SS ROMULUS,

Appellant,

vs.

ROY E. POTTER,

Appellee.

BRIEF OF APPELLANT

*Appeal from the United States District Court
For the District of Oregon.*

LOFTON L. TATUM,
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FILED

JAN 27 1955

PAUL P. O'BRIEN,
CLERK

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United States
COURT OF APPEALS
for the Ninth Circuit

WIEL AND AMUNDSEN, A/S,
as claimant of the SS ROMULUS,
Appellant,
vs.

ROY E. POTTER,
Appellee.

BRIEF OF APPELLANT

*Appeal from the United States District Court
For the District of Oregon.*

JURISDICTION

Jurisdiction of the District Court was based upon this being a suit in Admiralty. Title 28 U.S.C.A. § 1333.

Jurisdiction of this Court is based upon this being an appeal from the decree entered in that suit. Title 28 U.S.C.A. § 1291.

The pleadings will be found on pages 3 to 21 of the Transcript of Record.

STATEMENT OF THE CASE

Libelant Potter was a longshoreman employed by a contract stevedore, Independent Stevedoring Company, to load lumber cargo aboard the Norwegian ship ROMULUS at North Bend, Oregon. The ROMULUS was a small lumber carrier with a forepeak raised about seven feet above the main deck. The ship was equipped with a guard railing along the entire distance of the after end of the forepeak, except for a small opening amidship from which a ladder led from the forepeak to the main deck. Respondent's exhibit 9 (R. 46) shows the details of the guard railing, particularly on the port side. The section of the guard railing immediately adjacent to the midship ladder was constructed with movable rails to permit mooring lines to be brought down to the deck (R. 94). The midship end of this movable rail was constructed in the shape of a hook which was inserted into an eye built on the midship stanchion. When the hook was so placed through the eye, a lateral force would not dislodge the rail—it required a direct upward pull to remove the hook end from the eye (R. 107).

Lumber cargo had been partially loaded on the deck of the vessel at No. 1 hatch, the area immediately aft of the forepeak. Along the port side the lumber deck cargo was stored to a height of about six feet, except for a two or three foot strip running fore and aft, next to the hatch coaming where the lumber was stowed only three feet high (R. 92) (Ex. 9, R. 46).

On the morning of the accident involving libelant, Mr. Potter was working as acting hatch boss at No. 1 hatch. At about 8:30 a.m. he was standing on the deck cargo on the portside of No. 1 hatch while his immediate superior, the walking boss, Girt, was standing on the forepeak by the midship ladder. Apparently libelant wished to talk with the walking boss. Rather than climb over the guard railing to the forepeak and walk across the forepeak, or climb down from the deck cargo, cross the deck and ascend the ladder to the forepeak, libelant chose to sidestep along the after edge of the forepeak outside the guard rail, holding on to the top rail. There was no proof that this manner of using the guard rail was usual and normal, and witnesses who had worked aboard the vessel many times on earlier voyages into Coos Bay had never seen anyone so using this guard rail (R. 94, 95, 101, 105, 106).

While he was proceeding along toward the ladder and was almost to the ladder, libelant exerted a direct upward pull on the removable top rail pulling the hook out of the eye, which caused him to fall to the deck below. The manner in which libelant was seeking to move is clearly illustrated by libelant's exhibit No. 6-D printed on page 45 of the Record. This photograph was posed by the walking boss, Girt.

Libelant contended that all ship's equipment, when not in use, should be secured so that he could use the equipment in any manner he desired. Because this rail was not fastened into the eye by a cotter key, mousing or other device, he contended the vessel was unseaworthy and the owners negligent.

The case was tried before the Honorable Claude McCulloch who rendered a decree in favor of libelant for \$13,601.00.

It is from that decree that this appeal is taken. All of the facts essential to a determination of the issues of liability in this case are undisputed. Appellant is appealing from the conclusions drawn by the trial court that these facts established unseaworthiness and negligence. Such conclusions are fully reviewable by the Court of Appeals.

Bonnewell v. United States (CCA 4, 1948), 170 F. (2d) 411, 412, 1948 A.M.C. 1954;

Ellis v. American Hawaiian SS Co. (CCA 9, 1948), 165 F. (2d) 999, 1948 A.M.C. 707.

SPECIFICATION OF ERRORS

I.

Appellant contends that a ship is seaworthy when its equipment is sufficient and fit for the ordinary and usual circumstances to be anticipated by the owners or master of the ship. Because the guard rail was sufficient for its ordinary and usual uses, appellant contends the trial court erred in concluding from undisputed facts that the vessel was unseaworthy because the guard rail was not affixed permanently or secured with a cotter key or shaker or other device through the eye of the hook (R. 24, 26, 31, 32, Finding of Fact V, VI, VII, Conclusion of Law II, Assignment of Error I, II, III, V, VII).

II.

Appellant further contends that the owners were not negligent in maintaining the vessel because the guard rail was sufficient for its usual purpose, and that the unauthorized and improper use of the guard rail by libelant was not reasonably foreseeable by the owners. Thus appellant urges that the trial court erred in concluding otherwise (R. 24, 26, 31, 32, Finding of Fact V, VI, VII, Conclusion of Law II, Assignment of Error I, II, III, V, VII).

III.

Lastly, appellant contends that libelant was himself guilty of contributory negligence as a matter of law in deliberately choosing a potentially unsafe route when two clearly safe routes were available to him. Appellant assigns as error the trial court's ruling that libelant did not choose an unsafe way in which to perform his work and was not negligent (R. 25, 26, 31, 32, Finding of Fact XI, Conclusion of Law III, Assignment of Error IV, VI, VII).

ARGUMENT

I.

The Romulus was Seaworthy in Respect to the Guard Rail at the After Edge of the Forepeak.

The duty to provide a seaworthy vessel is a duty to supply and keep in order the proper appliances appurtenant to the ship. *THE OSCEOLA*, 189 U.S. 159, 47

L. Ed. 760. It means that ordinary and usual circumstances must be anticipated by the owner or the master of the ship to provide the seaman or the employees with a vessel that is sufficient and fit to encounter the ordinary perils of the contemplated voyage. In short, it is the sufficiency of the vessel in materials, construction, function, equipment, officers, crew and outfit for the trade or service for which it is being employed. *McLeod v. Union Barge Line Co.* (D.C. Pa. 1951), 95 F. Supp. 366, aff. 189 F. (2d) 610.

Under the foregoing rule, the ROMULUS was seaworthy at the time of libelant's injury.

An examination of the photographic evidence, particularly those reproduced in the Record (pages 44, 45), shows the guard rail at the after end of the forepeak on the ROMULUS. It is obviously designed as a safety measure to keep men from falling from the forepeak to the main deck below. In this regard it amply fulfilled its function. The walking boss, libelant's immediate superior, clearly brought this out, and it was not in any manner disputed by libelant.

"Q. . . . Could you tell the court from your experience what would be the purpose of this guard railing?

A. It was for the purpose of protecting the men from falling off the forecastle when they were working there—I should say, sailors working there at sea; also when a man was walking along the fore-castle, a longshoreman or sailor, to keep him from falling off the forecastle onto the main deck, in case they would fall sideways.

Q. I think I am right when I say you testified the railing would serve that purpose.

A. Yes." (R. 112)

As pointed out in the Statement of the Case, above, this guard rail was removable so that mooring lines could be brought down to the No. 1 winches.

“Well, it was built that way for the mooring lines, in case of an emergency, to use the No. 1 winches. It was built that way by the original builder.” (R. 105) (see also R. 94)

But, despite the fact that the guard rail was removable, it nevertheless was a safe and proper appliance under the seaworthiness rule. Bearing in mind that its purpose was to protect men from falling from the forepeak to the deck, it was so constructed that a lateral force (the force which would be expected from a person on the forepeak) would not dislodge the rail. Only a direct upward pull would remove the hook end of the rail from the eye. This was not contradicted in the evidence.

“Q. After the accident did you go up on the forepeak and make a check as to what force it would take to pull that railing out of the eye? Did you or did you not?

A. Yes.

Q. Will you explain to the court what you found.

A. Well, I found that it had to be pulled straight out.

Q. Before the railing would come out?

A. Yes.

Q. What was the effect of a lateral force against the railing?

A. Well, it would stay.

Q. The railing would stay in place with a lateral force exerted?

A. Yes.” (R. 106, 107)

No person standing on the forepeak, forward of the rail, could dislodge the rail without standing next to it

and pulling straight up. Certainly such a rail was seaworthy under all ordinary and usual circumstances.

Libelant relied in the trial court upon the fact that the hook end, after it had passed through the eye, was not secured by a cotter key, or shaker, or other device, and urged that such absence rendered the rail unseaworthy. However, the undisputed evidence in this case is that the guard rail—without the cotter key or other device—was adequate, sufficient and fit for its acknowledged purpose. Because of this, the presence or absence of the cotter key or other device is without significance.

Such a contention, as libelant makes, implies that seaworthiness means that the vessel's appurtenances must be sufficient and fit to meet *any demand* which libelant might make upon them, without regard to the ordinary and usual circumstances of use. To analyze libelant's argument further—apparently if he chose to secure the guy wires from a heavy lift boom to this guard rail or one of its stanchions, and the rail or stanchion carried away under a heavy load, he would then contend that the rail or stanchion was unseaworthy. This clearly is beyond any rule of seaworthiness.

It was only because libelant adopted a dangerous and unprecedented method of using this guard rail that he was injured.

In similar cases it has been held that there is neither unseaworthiness nor negligence. In *Holub v. Sword S.S. Line, Inc.* (CCA 5, 1942), 132 F. (2d) 206, libelant was climbing about in the hold of the ship, using cargo

cleats rather than ladders. He fell when one of the cleats broke. The Court held in favor of the ship, saying at page 207:

"The cleats were placed and maintained in the ship solely to hold the cargo battens in place and not for use by appellant or others in climbing about inspecting the ship. Appellee owed appellant no duty to maintain them so that appellant could safely use them to climb upon, and the ship was not rendered unseaworthy because of appellee's failure to do so, nor was such failure negligence unless appellee knew or, under the facts, should have known, or was charged with notice that appellant intended to or would so use them. The Queen Elizabeth, 209 F. 712, Consolidation Coastwise Co. v. Connelly, 250 F. 679, 680, New Orleans Coal & Bisso Towboat Co. v. U. S., 86 F. (2d) 53, Smith v. U. S., 96 F. (2d) 976."

And in *Christiansen v. United States* (D.C. Mass. 1951), 94 F. Supp. 934, a ship cleaner fell when a sweat-board upon which he was climbing broke. There the Court said:

"From all of the evidence submitted I find that there was neither neglect on the part of the boat owner or his employees nor unseaworthiness when understood as liability without fault. The sweat-board made of dunnage was put there for but one purpose—protection of cargo—and never intended to be used as a ladder. Recovery in this case is not being denied on any theory of assumption of the risk. *It is directed to the proposition that an instrumentality properly used aboard the vessel for one purpose cannot be changed into a dangerous instrumentality by reason of the adoption of the custom of carelessness or neglect on the part of those who use the instrumentality.* There is no unseaworthiness in this case." (Italics added)

In *Sulsenti v. Cadogan S.S. Co. Ltd.* (S.D. N.Y. 1943), 54 F. Supp. 570, the libelant, a longshoreman, fell, alleging that a cargo batten broke. The Court stated:

“Even assuming that the accident occurred in the way that libelant now says it did, I still do not think that there can be any recovery against the Steamship Company. Cargo battens are not intended to be used as ladders. The *Queen Elizabeth*, 209 F. 712, *Aurigemma v. Nippon Yusen Kaisha Co.*, 238 N.Y. 183, 144 N.E. 495.”

The instant case clearly falls within the rule of the cases cited above. The guard rail was properly used aboard the *ROMULUS* for the purpose of protecting men working in the forepeak from falling onto the deck. It was not intended as a walkway or to be used by men hanging precariously onto the after end and sliding along as the libelant was doing. The adoption of a dangerous method for libelant to perform his work does not turn a proper instrumentality into an unseaworthy one nor does it render the owner liable for negligence. As will be commented upon later, there is no proof in this case that the vessel or its owners knew or should have known that the libelant or any other longshoreman was intending to use the guard rail in the manner in which he did.

The leading case of *Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85, 90 L. Ed. 1099, and the more recent case of *Petersen v. Alaska Steamship Company, Inc.* (CA 9, 1953), 205 F. (2d) 478, both involved injury to longshoremen caused by defective appurtenances which broke while being properly used by longshoremen. Nowhere have we found any case extending the doctrine

of seaworthiness to a condition which is adequate and safe for all uses and purposes intended but because of misuse by a longshoreman an injury results.

Appellant therefore contends that the trial court erred in concluding that the guard rail on the ROMULUS was unseaworthy at the time of libelant's injury.

II.

The Owners of the Romulus were not Negligent In Failing to Affix Permanently or Secure the Guard Rail With a Cotter Key or Other Device.

Under the undisputed facts in this case the questions of unseaworthiness of the rail and negligence of the owners in maintaining the rail as it was at the time of libelant's injury are practically identical. For that reason the discussion hereinabove on unseaworthiness is equally applicable to the claim of negligence on the part of the owner.

In *Holub v. Sword S.S. Line Inc.*, supra, and *Christiansen v. U. S.*, supra, the opinions disposed of unseaworthiness and negligence at the same time and in the same manner, absolving the vessel and its owner from liability.

The libelant did not deny that the rail was for the purpose of protecting the men from falling off the forecastle when they were working there. Nor did he deny that the guard railing would serve that purpose. Where the rail was thus adequate and proper for the uses and purposes for which it was intended, the owner was not negligent in maintaining it in that condition.

III.

**The Maintenance of the Guard Rail in the
Condition it was at the Time of Libelant's
Injury was not Negligent Because the
Danger of Injury in the Manner
Sustained by the Libelant was
Not Reasonably Foreseeable.**

It is fundamental in negligence cases that the court must conclude as a matter of law that the injury ought to have been foreseen in the light of attending circumstances before a conclusion of negligence can be made.

Pittsburgh S.S. Co. v. Palo, (CCA 6, 1933), 64 F. (2d) 198, 200:

" In neither were facts shown which should lead the defendant to anticipate the danger of injury to its seamen by virtue of the existing condition of the ship's appliances. Whether or not the fact that injury of some sort might reasonably have been foreseen bears a proper part in the application of the doctrine of proximate cause (see *Johnson v. Kosmos Portland Cement Co.* (C.C.A.), 64 F. (2d) 193, and *Smith v. Lampe* (C.C.A.), 64 F. (2d) 201, decided at this session), it is now firmly established that no act or omission may be considered negligent, unless the danger of injury was reasonably foreseeable. In *Lincoln Gas & Electric Co. v. Thomas*, 74 Neb. 257, 260, 104 N.W. 153, 154, the court thus expressed the same thought: 'It is of the essence of actionable negligence that the party charged should have knowledge that the act complained of was such an act of omission or commission as might, within the domain of probability, cause some such an injury as that complained of.' In *Hope v. Fall Brook Coal Co.*, 3 App. Div. 70, 75, 38 N.Y.S. 1040, 1043, the court says: 'The circumstances necessary to

be known before the liability for the consequence of an act or omission will be imposed must be such as would lead a prudent man to apprehend danger.' See, also, *Burton v. Greig*, supra; *Waters-Pierce Oil Co., v. Van Elderen*, 137 F. 557 (C.C.A. 8); *Carey v. Baxter*, 201 Mass. 522, 525, 87 N.E. 901; *Stedman v. O'Neil*, 82 Conn. 199, 72 A. 923, 22 L.R.A. (N.S.) 1229; *Wickert v. Wisconsin Central R. Co.*, 142 Wis. 375, 125 N.W. 943, 20 Ann. Cas. 452. In view of these decisions, and many others, it is not sufficient to show simply that a defect existed; the defect must be of such nature that the defendant should reasonably have apprehended the danger of injury."

See also:

Calmar Steamship Co. v. Taylor, 99 F. (2d) 84 (CCA 3, 1937), (Reversed on other grounds, 303 U.S. 525, 82 L. Ed. 993).

Milwaukee etc. Railway Co. v. Kellogg, 94 U.S. 469, 475, 24 L. Ed. 256.

Libelant has failed completely in this fundamental aspect of his case. There were no facts shown which should lead appellant to anticipate the danger of injury to workmen aboard the ROMULUS by virtue of the construction of the guard rail, or the absence or presence of a cotter key or other securing device.

The rail had never been used in the manner used by libelant. Mr. Harold, the supercargo who had worked aboard the ROMULUS for 17 or 18 times, stated that he had never seen anyone walking along the after edge of the railing as Mr. Potter did when he was injured (R. 94, 95). The walking boss who had worked aboard the vessel as longshoreman and walking boss on 14 or

15 different voyages of the vessel into Coos Bay (R. 101) stated that to the best of his recollection he had never seen any longshoremen walk along the after edge of the forepeak (R. 105, 106).

There is no evidence of any custom of longshoremen walking along the after edge of the forepeak in the manner used by Mr. Potter. There is no evidence that this rail or any other rail along the after edge of a forepeak had ever been used by any longshoreman on any vessel in the manner in which Mr. Potter was attempting to use the one on the ROMULUS.

In view of this undisputed evidence it is perfectly clear that under all of the circumstances the shipowner could not have reasonably anticipated Mr. Potter's manner of using the rail and his possibility of being injured thereby. There is absolutely no evidence that the shipowner knew or should have known of the possibility that any workman aboard the ROMULUS would hang on the outer edge of the forepeak rail and exert a direct upward pull of sufficient force to dislodge the hook of the rail from the eye on the stanchion.

Because of this, appellant contends the trial court erred in concluding the shipowner was negligent.

IV.

Libelant Himself was Guilty of Contributory Negligence as a Matter of Law in Deliberately Choosing a Potentially Unsafe Route When Two Safe Routes were Available to Him.

From Mr. Potter's position on the deckload near No. 1 hatch there were two methods he could have used to get to the position of the walking boss on the forepeak, other than the route which he did take. This is set out clearly in the testimony of Mr. Harold beginning at page 95 of the Record:

"Q. From the place where Mr. Potter was standing, that is, on the forward part, on top of the deckload, what was a route he could have taken to get up on the forepeak, just in front of the emergency ladder on the forepeak?

A. Well, he could have stepped down onto the wharfway and walked up the ladder.

Q. Walked across the main deck and up the ladder?

A. Yes.

Q. What was another route he could have taken?

A. Well, he could have walked from where he stepped over the rail directly ahead."

Instead Mr. Potter chose the more patently dangerous route of sliding along the after edge of the forepeak, holding onto the rail. Immediately after the accident he recognized his own carelessness when he made the statement "Maybe it will knock some sense into my head" (R. 79).

Despite this uncontradicted testimony the trial court held as a matter of fact that the libelant did not

choose an unsafe way in which to perform his work, was not negligent and concluded as a matter of law that libelant was not himself contributorily negligent (R. 25, 26).

In *Bohannon v. United States*, 92 F. Supp. 700 (D.C. S.D. N.Y., 1950), aff. 185 F. (2d) 678, the court considered a similar situation. A seaman was ordered to a particular part of a ship and there were three routes by which he could get there, one absolutely safe, another which was reasonably safe and a third which was very hazardous. The seaman took the most hazardous and was injured.

“The whole charge of negligence is based on the false assumption that there was no safe route to the forepeak at the time, because of the sea. The fact is that there was an absolutely safe way across the catwalk from the midship house to the forepeak; and there was a reasonably safe way by using the catwalk half way and the well deck for the latter half of the distance to the forepeak. There was no negligence on the part of any of the officers or crew. The tanker was seaworthy. Bohannon’s accident was due solely to his own recklessness. The cause of action based on negligence is without merit.

“

“The following quotation from *Holm v. Cities Service Transp. Co.*, 2 Cir., 60 F. (2d) 721 at p. 722 is applicable: ‘Where the conduct of the injured seaman, however, is induced only by his own free will, and he acts to his injury at a time and place when he is free to choose between doing what is safe and what is known to him to be dangerous, he is obviously under no more compulsion than is an employee on land.’

“In *Johnson v. United States*, 74 F. (2d) 703, 704, which is very similar to the facts in the case

at bar, the Circuit Court of Appeals, Second Circuit, stated: ' A seaman to whom two ways were available, one dangerous and the other safe, assumed whatever risk was involved in taking the dangerous course when he selected it through his personal choice and not because of any compulsion or ignorance of the situation.' " 92 F. Supp. 700, 703.

See also, *Tampa Interocean S. S. Co. v. Jorgensen* (CCA 5, 1938), 93 F. (2d) 927.

There is no dispute in the evidence that there were two safe routes available to Mr. Potter and that he deliberately chose a potentially dangerous route. Under the above authorities, appellant contends that libelant's deliberate choice of a hazardous route was the cause of his injury and that he should be charged with contributory negligence as a matter of law.

CONCLUSION

Appellant respectfully contends that the decree of the trial court should be reversed upon the grounds that the undisputed evidence showed a guard rail which was adequate, safe, seaworthy and proper for all the uses and purposes for which it was intended, that libelant's method of using the rail was unforeseen and without precedent, and that libelant himself caused his injury by unnecessarily choosing a hazardous route when two safe routes were open and obvious to him.

Respectfully submitted,

LOFTON L. TATUM,
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WOOD, MATTHIESSEN, WOOD & TATUM,
Proctors for Appellant.

United States
COURT OF APPEALS
for the Ninth Circuit

WIEL AND AMUNDSEN, A/S,
as claimant of the SS ROMULUS,
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Appellee.

BRIEF OF APPELLEE

*Appeal from the United States District Court of the
District of Oregon.*

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PAUL P. O'BRIEN,
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United States
COURT OF APPEALS
for the Ninth Circuit

WIEL AND AMUNDSEN, A/S,
as claimant of the SS ROMULUS,
Appellant,
vs.

ROY E. POTTER,
Appellee.

BRIEF OF APPELLEE

*Appeal from the United States District Court of the
District of Oregon.*

SUPPLEMENTAL STATEMENT OF THE CASE

Inasmuch as Appellant's Statement of the Case contains certain inaccuracies, libelant finds it necessary to make a brief supplemental statement.

With respect to the hook at the end of the movable rail which pulled loose and caused the libelant to fall backwards to the deck below, there was a small eye at the end of said hook which was covered and plugged with paint at the time of the accident (R. 15, 16, 85, 87,

105). The purpose of this eye was to receive a cotter key, pin, or mousing which, when properly attached, would keep the hook from pulling out of the eye attached to the midships stanchion (Exhibits 1-B, 6-D, R. 44, 45).

When the hook was examined immediately after libelant's fall, it was discovered that it was not secured by a cotter key, pin, or mousing (R. 86) although the purpose of the eye in the hook was to receive a device to hold the rail securely in the stanchion eye (R. 98, 86, 109).

Libelant was injured while sidestepping along the after edge of the forepeak, holding onto the top rail. Appellant suggests (Br. 3) that libelant was negligent in choosing this method of going to see the walking boss, Girt, instead of going over the rail or climbing down from the deck cargo to a narrow space between the aft end of the forepeak and the hatch square—a route considered risky by libelant (R. 77). On the other hand, libelant testified that he had ample footing and did not slip (R. 47) and the route he took appeared safe enough to him (R. 47, 77, 82).

Appellant's Statement of the Case says that there is no evidence that "walking the rail" i.e. walking along the outside of a rail, is usual and it implies that libelant was negligent in so doing (Appellant's Br. 3). In fact, however, Appellant's own witness, Girt, testified that he had seen men in libelant's position "go all ways" to the forepeak (R. 107) and Girt admitted that he himself had walked the rails during his many years of longshor-

ing (R. 112). He also stated that this was a common practice of longshoremen (R. 113).

Finally, Appellant states (Br. 3) that libelant "exerted a direct upward pull" on the top rail, thus pulling the hook out of the eye. There is no evidence in the record supporting such an assertion.

SUMMARY OF ARGUMENT

There was conflict in the oral testimony as to whether Appellant's vessel was unseaworthy and whether libelant was negligent in putting the rail to an improper use or by choosing an unsafe method of going to talk to the walking boss. The District Court's findings in favor of libelant on these issues were based upon substantial evidence and should not be disturbed by this court.

The SS ROMULUS was unseaworthy at the time of the accident because the guard rail which gave way was not properly secured, and Appellant, as the owner of the ROMULUS was negligent in failing to see to it that the guard rail was secure.

The use to which libelant put the guard rail was usual, proper and prudent, and the injury to libelant was reasonably foreseeable.

THE DISTRICT COURT'S FINDINGS SHOULD NOT BE DISTURBED

Appellant rests its case upon the proposition that where the issues of liability are undisputed, the Court of Appeals sitting in admiralty may fully review the findings of the Trial Court. This rule, however, has no application where, as in this case, there is contradictory oral testimony in the record which the Trial Court weighed in reaching its conclusions. So long as there is substantial evidence to support the findings of fact made below, this Court should not upset them.

Petterson v. Alaska SS Co. Inc., 205 F. (2d) 478 (CA 9, 1953), affirmed per curiam 347 U.S. 396, 98 L. Ed. 798, 1954 A.M.C. 860.

Diana Claire-Crescent, 213 F. (2d) 801, 1954 A.M.C. 1164 (CA 9, 1954).

Brett v. J. M. Carras Inc., 203 F. (2d) 451 (CA 3, 1953).

The Mabel, 61 F. (2d) 537 (CA 9, 1932).

The Heranger, 101 F. (2d) 953 (CA 9, 1939).

Krey v. U. S., 123 F. (2d) 1008 (CA 2, 1941).

There was conflicting testimony as to whether the SS ROMULUS was unseaworthy by reason of there being no pin or other device to secure the rail to the stanchion. Appellant attempted to prove that the rail hook fit into the stanchion eye tightly (R. 95, 108) and it contended that the rail was fit for ordinary use because only a vertical, and not a lateral, force would dislodge it, even though it was not secured (R. 106, 107). Finally, Appellant produced evidence which suggested that because the eye in the hook was filled with paint,

it was no longer necessary for a device to be used to secure the hook to the stanchion (R. 100, 105).

On the other hand, libelant's testimony was to the effect that all of the ship's movable equipment should have been secured when not in use (R. 49). There was evidence showing that the eye in the hook was placed there so that the rail could be secured, and that in fact the eye had been so covered over with paint that it was not used for the purpose for which it was designed (R. 85, 86, 98).

There was further conflict in the testimony as to whether libelant was contributorily negligent. There was substantial evidence to prove that the practice of sidestepping on the outside of a guard rail was customary where the situation warranted it (R. 47, 107, 112) and that under the circumstances existing in this case, libelant would not have been injured except for the unsecured rail which gave way while he hung onto it (R. 47). Furthermore, libelant testified that the route he took appeared safe inasmuch as he could not foresee that a section of guard rail would be unsecured (R. 47, 82, 77), and that at least one alternative route, that across the deck near the hatch, seemed risky to him (R. 77).

Appellant cited little evidence to support its contention of contributory negligence, stressing that libelant "chose the more patently dangerous route" (Br. 15)—although the record is devoid of evidence that the route was "patently dangerous", or otherwise dangerous except insofar as Appellant made it so.

Findings of seaworthiness or unseaworthiness are usually findings of fact.

Mahnich v. Southern SS Co., 321 U.S. 96, 88 L. Ed. 561 (1943).

We think that the trial judge's findings in favor of libellant should be sustained. He heard the oral testimony and was in a position to weigh the credibility, veracity, competency and sincerity of the witnesses. His conclusions were supported by substantial evidence and therefore under the cases cited herein they should be affirmed.

APPELLANT'S VESSEL WAS UNSEAWORTHY

In *The Osceola*, the Supreme Court announced the doctrine that a vessel and her owner are "liable for injuries received by seamen in consequence of the unseaworthiness of the ship or a failure to supply and keep in order the proper appliances appurtenant to the ship." (189 U.S. at 175, 23 S. Ct. 487). This doctrine was extended to cover stevedores because they perform the traditional work of seamen.

Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90 L. Ed. 1099 (1946).

Appellant contends that the rail which gave way was seaworthy despite the acknowledged fact that it was not secured to the midship stanchion and the hook-eye which was supposed to be used in so securing the rail was plugged with paint (R. 15, 16). Appellant suggests that because one of its witnesses experimented with the rail and hook *after* the accident and found that

only a "vertical" force could dislodge it, it was fit for its admitted purpose, that is, guarding against seamen or workers being thrown from the forepeak to the deck below.

Such reasoning founds upon two rocks:

First, there is no evidence in the record to show that the hook was firmly seated in the stanchion eye just prior to the accident (R. 111). It is simple mechanics that if the hook were partially out of the eye a lateral force could dislodge it just as in the case of a screen door hook which is only partially through the eye. Then there is the further fact that the manufacturer of the rail, apparently anticipating that the hook might become partially dislodged, with the disastrous consequences which occurred in this case, provided an eye in the hook which was intended to receive a cotter key or other such device to prevent the hook from pulling out of the stanchion eye (R. 86, 98). In permitting the use of the rail without a cotter pin, the vessel created a dangerous condition which fine-spun distinctions between "vertical" and "lateral" forces cannot cure.

Second, even if the rail could withstand "lateral" forces but not "vertical" ones it would be unseaworthy, for the purpose of the rail is to permit people to hang onto it to prevent them from falling. Libellant was not notified that the rail was of such delicate design that it would not help him if he exerted "vertical" force when he took hold of it (R. 50). Without such notice, the rail, instead of being a protective device, became a dangerous trap which invited the unwary worker to rely on it for support.

Appellant admits in its brief that the guard rail was "a safety measure to keep men from falling from the forepeak to the main deck below" (Br. 6). This would seem to dispose of Appellant's defense, for obviously the rail failed to keep libelant from falling; indeed when it came loose from the midship stanchion it virtually threw him to the deck (R. 42). Thus the rail did not meet the purpose for which Appellant itself admits it was supposed to be constructed, and the ship was therefore unseaworthy.

APPELLANT WAS NEGLIGENT IN FAILING TO SECURE THE RAIL TO THE MIDSHIP STANCHION

The facts which establish the unseaworthiness of the SS ROMULUS also prove that the vessel's owners were negligent in failing to secure the rail. The rail was designed so that it could be made secure by using a cotter key or mousing to keep the hook from pulling out of the stanchion eye (R. 44, 45). Appellant not only failed to secure the rail but actually painted over the hook-eye so that it could not be used for the purpose for which it was intended (R. 15, 16, 85, 87, 105). No clearer case of improper maintenance could be conceived of, and Appellant should be held liable for the injuries caused thereby.

We again repeat our objection to Appellant's defense that the rail was intended only to protect persons forward of it. There is nothing in evidence to prove this

and common sense indicates that this is a makeshift, sham argument. Presumably if libelant had been on the forepeak forward of the rail, and had fallen because it gave way, Appellant would have argued that the rail was intended to guard only workmen to the aft of it. The plain truth is that the rail was there for people to hold onto and for that purpose it should have been secured. Because it was not, libelant sustained grave injuries.

Appellant raises the further objection however, that it was not negligent because the manner in which libelant was injured could not be foreseen (Br. 12-14). While foreseeability is indeed an element of negligence, this does not require that the exact manner of injury, or the particular accident, be foreseen.

Storgard v. France etc. SS Corp., 263 F. 545 (CA 2, 1920), cert. denied 252 U.S. 585, 64 L. Ed. 729.

Moreover, the fact that the injury was not anticipated is no defense to a claim for indemnity for an injury caused by the unseaworthiness of a vessel or its appliances.

The H. A. Scandrett, 87 F. (2d) 708 (CA 2, 1937).
Stokes v. U. S., 55 F. Supp. 56 (D.C.S.D.N.Y., 1944), modified on other grounds, 144 F. (2d) 82 (CA 2, 1944).

Appellant's liability is grounded upon the simple fact that it provided a rail for people to hang onto, and that this rail was not properly maintained so as to be capable of performing its function. It is clearly foreseeable that

where a guard rail is unsecured, someone may get hurt if they rely on it. It does not matter a whit where libelant was when the rail gave way, or what type of force, "vertical" or "lateral", he exerted on it for the rail appeared to be, and should have been, able to provide him with support.

Appellant cites the case of *Pittsburg S.S. Co. v. Palo*, 64 F. (2d) 198 (CA 6, 1933), to support its argument that the manner of libelant's injury must be foreseeable. But the very language quoted by Appellant (Br. 12) states that the test of foreseeability is "the danger of injury" or "some such injury", and not whether the manner of libelant's injury could be foreseen.

To suggest that before a ship can be held liable for negligently permitting a guard rail to be unsecured, the exact manner in which the injured seaman or workman relied on the rail for support must be foreseen is too preposterous to be taken seriously. We repeat: the rail was there to support people and because it was improperly secured it gave way and libelant was injured thereby. Appellant is therefore liable.

LIBELANT WAS FREE FROM CONTRIBUTORY NEGLIGENCE

Appellant seeks to apply to this case the rule that where a seaman knowingly takes an unsafe route to perform his duties in preference to another safe route, and is injured thereby, he is guilty of contributory negligence. Both *Bohannon v. United States*, 92 F. Supp. 700

(D.C.N.Y., 1950) affirmed 185 F. (2d) 678, and *Tampa Interocean S.S. Co. v. Jorgenson*, 93 F. (2d) 927 (CA 5, 1938), cited by Appellant, are cases where the injured party took an unsafe route with full awareness that the particular route was unsafe. In *Bohannon*, libelant had been repeatedly warned to take the catwalk to the forepeak, but instead he proceeded across the well deck in the face of heavy seas breaking onto it. In *Tampa*, it was held that contributory negligence exists only if the seaman knowingly takes an unsafe route.

In the case at bar, the record shows that libelant believed the route he took was safe (R. 47, 82, 77) and that he did not slip from the forepeak (R. 47), but rather, he was thrown from it when the rail gave way. He testified that the rail, being a movable piece of ship's gear, should have been secured (R. 49, 50, 80, 81), and inasmuch as he was not warned (R. 50), libelant was entitled to rely on appearances and the usual practice.

There was evidence in the record from which the trial court could find that libelant's "walking the rail", i.e., sliding along the after edge of the forepeak while hanging on the rail, was a common practice and not negligent (R. 107, 112, 47). As to the alternate routes available to libelant, he testified that one of them, across the deck between the hatch and the forepeak, seemed risky to him (R. 77).

Regardless of whether there were safe routes other than that taken by libelant, he was not negligent unless he was warned of, or knew about, the dangerous condition of the rail which gave way. Libelant could not be

expected to guess that Appellant's rail would not support him because it was not secured. Appellant's assertion that libelant "deliberately chose a potentially dangerous route" (Br. 17) is contradicted by the record and ignores the fact that the lack of a pin or mousing to secure the rail was a partially hidden defect discoverable only upon close inspection (Exh. 6-D). If the route chosen by libelant was unsafe, it was so because of Appellant's negligence which was unknown to libelant until after his fall.

It is settled law in this Circuit that before a libelant can be charged with contributory negligence, he must have created an unreasonable risk of injury to himself.

Kulukundis v. Strand, 202 F. (2d) 708 (CA 9, 1953).

Certainly under all of the circumstances in this case it cannot be said that libelant created such an unreasonable risk as to justify fastening upon him the onus of contributory negligence. As in the *Kulukundis* case, Appellant here created the unsafe condition which led to libelant's injury and it would not be proper to penalize libelant by requiring of him a higher degree of foresight than is expected of Appellant who has an absolute and non-delegable duty of providing a seaworthy vessel.

See also: *Wong Bar v. Suburban Petroleum Transport, Inc.*, 119 F. (2d) 745 (CA 2, 1941).

CONCLUSION

Libelant asks that the judgment of the District Court be affirmed because it was based on conflicting oral testimony which the trial court was in the best position to weigh and evaluate. Moreover, the record is clear that the rail which gave way was not properly secured to the stanchion and as a result, it was unable to fulfill the purpose for which it was installed. It was therefore unseaworthy, and the Appellant was negligent and properly held liable by the District Court.

Respectfully submitted,

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United States
COURT OF APPEALS
for the Ninth Circuit

WIEL AND AMUNDSEN, A/S,
as claimant of the SS ROMULUS,
Appellant,
vs.

ROY E. POTTER,
Appellee.

REPLY BRIEF OF APPELLANT

*Appeal from the United States District Court for the
District of Oregon.*

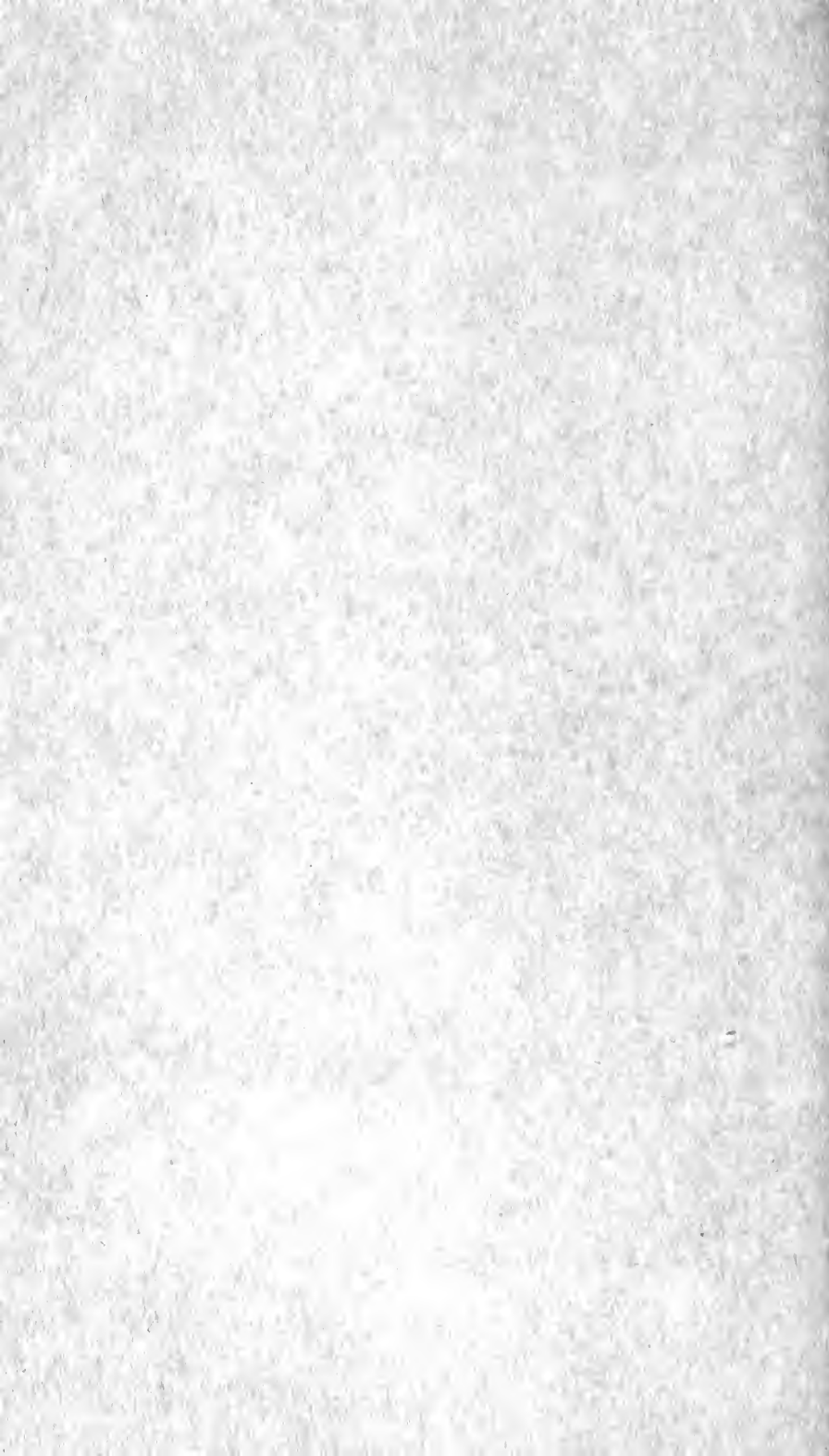
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No. 14527

United States
COURT OF APPEALS
for the Ninth Circuit

WIEL AND AMUNDSEN, A/S,
as claimant of the SS ROMULUS,
Appellant,
vs.

ROY E. POTTER,
Appellee.

REPLY BRIEF OF APPELLANT

*Appeal from the United States District Court for the
District of Oregon.*

The contention made by Appellee in his brief can be summarized simply by saying Appellee claims the guard rail at the after end of the forepeak of the ROMULUS was provided for "people to hang onto", and it should have supported libellant *regardless* of what use he made of the guard rail. His argument applies both to his claim of unseaworthiness and negligence.

But this contention of Appellee can not be supported, either in the law or by the evidence in the case

at bar. The obligation of a shipowner, both factually and legally, is to provide a vessel with appurtenances which are adequate and safe *for the uses and purposes intended and anticipated*.

THE EVIDENCE

The only evidence concerning the purpose of the guard rail is that of Girt, the walking boss:

“Q. . . . Could you tell the court from your experience what would be the purpose of this guard railing?

A. It was for the purpose of protecting the men from falling off the forecastle when they were working there—I should say, sailors working there at sea; also when a man was walking along the forecastle, a longshoreman or sailor, to keep him from falling off the forecastle onto the main deck, in case they would fall sideways.

Q. I think I am right when I say you testified the railing would serve that purpose.

A. Yes.” (R. 112)

The fact that this guard rail would serve its acknowledged function was nowhere contradicted by Appellee in the evidence. The only manner of dislodging the rail was by a direct upward pull (R. 107) and this is what Appellee did (R. 104).

Nowhere is there any testimony that this particular guard rail should be sufficient to support *any use* which could be made by Appellee. Nowhere is there any testimony that the manner of using the rail which was attempted by Appellee was to be expected or anticipated. In fact, the only evidence is to the contrary. No witness

had ever seen any longshoreman sidestepping along the after edge of the forepeak, holding onto the rail (R. 94, 95, 105, 106). And there is absolutely no evidence of a common practice, as suggested by Appellee's brief (pp. 5, 11).

Appellee relies only upon his own assumption that "This rail that I had hold of was supposed to be secured" (R. 47) and counsel's ingenious argument about the walking boss's statement concerning "walking the rails". Appellee urges that this phrase means walking along outside of a rail and claims it is a usual practice. A careful reading of the explanation of the walking boss (R. 113) disproves counsel's argument. Girt stated that "walking the rail" is to "walk *along* the edge of the ship, along the railing". This certainly does not mean "to walk outside" the rail. And even more significantly in answer to counsel's claim, is this testimony from Girt, while talking about this so-called "walking the rails":

"Q. This rail would serve that purpose, would it not?

A. Yes." (R. 113)

The facts concerning the issues of liability are not in conflict in the testimony, despite Appellee's valiant attempt to conjure up such a conflict (Appellee's Brief 4, 5). The plain facts are that there was no cotter key or pin in a hole found in the hook end of the rail by digging through many coats of paint, nor was some other device used to secure the hook end of the rail after it passed through the stanchion eye. Equally clear is the fact that the rail, without these devices claimed

by Appellee, was adequate and safe for its intended uses and purposes.

There is no evidence that the eye in the hook was placed there so that the rail would withstand such extraordinary use as that made by libelant. Of equal force as the argument made by Appellee is the argument that the purpose of the eye in the hook was to prevent the rail from becoming dislodged by heavy seas coming over the bow while the vessel was underway.

At page 7 of Appellee's Brief he seeks by hypothesis and without evidence to suggest that possibly the hook of the rail was partly out of the stanchion eye and was thereby rendered insecure. The court need only read the transcript reference suggested by Appellee to find that it does not support Appellee's theory.

Because the rail, in the condition it was aboard the ROMULUS at the time of Appellee's injury, was sufficient and adequate for all its intended uses and purposes, the vessel was not rendered unseaworthy nor were the owners negligent in not providing a cotter key or shaker or other device.

THE LAW

Nor does the law require a shipowner, in order to supply a seaworthy vessel, to supply on the vessel appurtenances which meet any and all demands whatsoever which may be made upon them. The shipowner's obligation is to supply appurtenances which are adequate for the purpose for which they are ordinarily

used. *Mahnich v. Southern S. S. Co.* (1943), 321 U.S. 96, 103. See also, *Vileski v. Pacific Atlantic S. S. Co.* (CCA 9, 1947), 163 F. (2d) 553; *Page v. U. S.* (CCA 9, 1949), 177 F. (2d) 601. This obligation was fully met by Appellant.

As to the claimed negligence of Appellant, no authority is given by Appellee in support of his theory.

In fact nowhere in Appellee's brief does he discuss the cases in point which were cited in Appellant's Brief (pp. 8, 9, 10), which cases stood for the proposition (directly contrary to that urged by Appellee) that an instrumentality properly used aboard a vessel for one purpose cannot be changed into an unseaworthy appurtenance nor render the owners negligent by reason of being improperly used for another purpose by libellant.

CONCLUSION

As supplemented by this Reply Brief, Appellant relies upon its opening brief to answer Appellee's Brief and to support its contention that the decree of the trial court should be reversed.

Respectfully submitted,

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No. 14577

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

F. W. WOOLWORTH Co., RESPONDENT

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the United States Court of Appeals for the Ninth Circuit

No. 14577

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

F. W. WOOLWORTH CO., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*),¹ for the enforcement of its order issued against F. W. Woolworth Co., respondent herein, on July 20, 1954, following the usual proceedings under Section 10 of the Act, as amended. The Board's decision and order (R. 57-68)^{1a} are reported in 109 NLRB No. 32. This Court

¹ The pertinent statutory provisions are reprinted *infra*, pp. 20-21.

^{1a} References to portions of the printed record are designated "R." Wherever a semicolon appears, the references preceding the semicolon are to the Board's findings; those following the semicolon are to the supporting evidence.

has jurisdiction of the proceeding under Section 10 (e) of the Act, as amended, the unfair labor practices having occurred in San Bernardino, California, within this judicial circuit.²

STATEMENT OF THE CASE

I. The Board's findings of fact

This case presents the single issue whether respondent's refusal to reveal to its employees' statutory bargaining representative the names, hours, and wages of the employees covered by the collective bargaining contract violated Section 8 (a) (5) and (1) of the Act. The facts which are not in dispute may be summarized as follows:

The Retail Clerks Union, Local 1167, A. F. L., herein called the Union, is the exclusive collective bargaining representative of the retail store employees employed in respondent's store in San Bernardino, California. Its status as bargaining representative was established on March 22, 1951, by certification of the Board following a Board conducted election in which a majority of respondent's San Bernardino store employees designated the Union as their collective bargaining agent (R. 26).

One year later, on March 11, 1952, the respondent and the Union agreed upon their first collective bargaining contract to run for a 2-year term ending March 5, 1954 (R. 26; 8-15, 16). Section 5 of the contract established basic minimum wage rates for

² Respondent, a well known national chain of retail variety stores, does not deny that the operations involved herein affect commerce. No jurisdictional issue is presented (R. 25).

all employees. The establishment of the actual wage system, however, including the specification of the going wages, whether or not above the basic minimum, was reserved to respondent as among its "exclusive responsibilities" under the management prerogative clause found in Section 17. The contract contained no other reference or description of the actual wage rates except for a guarantee that "no employee shall suffer a reduction in wage rate on account of the signing of this agreement" (R. 9-10).

The contract further provided for wage reopening in mid-term, on March 7, 1953, for the express and limited purpose of making a "cost-of-living adjustment" in the basic minimum rate "at least" equal to the percent of change in the Bureau of Labor Statistics National Index, with the proviso that "a larger adjustment may be made by mutual agreement between the parties." These adjustments referred to the basic minimum rate only and did not affect the specific rate ranges or the rates actually paid (R. 26-27; 14-15). On the subject of hours, the agreement simply provided for daily and weekly overtime compensation geared to a 40-hour, 5½-day week (R. 9).

Contemporaneously with the execution of the contract on March 11, 1952, respondent, in response to the Union's request, furnished to it a list of all the employees covered by the contract. Thereupon the Union wrote to respondent, asking it to specify "the number of hours worked per week for each employee, also each employee's rate of pay the week ending prior to the effective date of the Agreement" "in

order to have a complete picture as of the date of the Agreement.” Respondent did not reply to this letter (R. 28; 22, 81, 82).

There the matter rested until early in 1953 when the parties commenced negotiations for revision of the basic hourly rates to conform at least to the changes in the B. L. S. National Index as provided in Section 21 (b) of the 1952 Agreement (R. 27, 58; 17).

The B. L. S. Index formula for the minimum increase required a raise of at least 1.42 cents per hour or roughly 57 cents for a 40-hour week in the basic minimum rate. The Union asked for an increase of 5 cents per hour or \$2 per week, and on March 13, respondent offered 2½ cents per hour or \$1 per week (R. 27; 15-19, 82-87).

In the course of these negotiations the Union renewed its request of 1952 for the names, classification, rates and hours of the employees covered by the contract. It urged that the information was needed “for the intelligent and equitable administration of the Agreement” as well as for the negotiations then at hand. Respondent again refused. During the course of the wage negotiations in the following 3 months, including the meetings of April 13 and April 24, the Union continued to press for this information, but respondent persisted in its refusal to reveal the names and wages and hours (R. 28, 58; 20, 22, 82-88, 102).

On April 30, 1953, the Union notified respondent that it had accepted respondent’s offer of March 13 to

increase the basic minimum wage \$1 per week (R. 27, 58; 20, 21, 99). A few days later, on May 5, 1953, the Union by letter reiterated its request for the payroll information, but respondent again failed to reply (R. 28; 22, 87, 102). On June 18, 1953, the Union filed the charge in this case with the Board, alleging, among other things, that respondent violated Section 8 (a) (5) and (1) by rejecting the Union's request for this payroll information.

II. The Board's conclusions and order

The Board concluded that whether the Union's request for payroll information be considered as relating to the pending negotiations for a general wage adjustment or as relating to the administration of the parties' collective bargaining agreement, respondent violated Section 8 (a) (5) and (1) of the Act by refusing to comply with the request (R. 58-59).³

Accordingly, the Board ordered respondent to cease and desist from the unfair labor practice found and affirmatively to furnish the Union, upon request, the name, classification, hours worked, and wage rate of each employee in the appropriate unit, and to post the usual notices (R. 63-64).

³ The Board, by a vote of 3-2, dismissed as unsupported that portion of the complaint charging that respondent had further violated Section 8 (a) (5) and (1) by dealing directly with the individual employees on the question whether the payroll information should be disclosed and by instigating and sponsoring among its employees a union-shop deauthorization petition in derogation of the Union's exclusive collective bargaining status (R. 59-63, 65-67).

ARGUMENT

Respondent, by refusing to reveal to its employees' statutory bargaining representative the names, hours, and wages of the employees covered by its collective bargaining contract, violated Section 8 (a) (5) and (1) of the Act

Briefly stated, the Board's order in this case rests on the proposition that the Union, as the representative designated under the Act to serve as exclusive agent for all employees in the appropriate unit "for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment" (Section 9 (a)), is entitled to know the names, the rates of pay, the wages, and the hours of the employees for whom it alone may act. It is the Board's view that respondent's obligation to recognize and to deal with the Union as the exclusive representative of these employees in matters affecting wages and hours clearly implies that it must, upon request, make available all details relevant to their wages and hours about which it must confer. Hence, the Board concludes, withholding of wage and hour information specifying the existing wage and hour structure and the going rates of these employees, all relevant to wage-hour discussions, violates Section 8 (a) (5) and (1) of the Act.

This proposition has been endorsed without qualification by every court which has had occasion to consider it. *N. L. R. B. v. Whittin Machine Works*, 217 F. 2d 593, 594 (C. A. 4);⁴ *N. L. R. B. v. Leland-Gifford Co.*, 200 F. 2d 620, 624 (C. A. 1); *N. L. R. B. v. Yawman & Erbe Mfg. Co.*, 187 F. 2d 947, 949

⁴ A petition for certiorari was filed in the *Whittin* case on March 7, 1955, and will presumably be passed on during the current term.

(C. A. 2); *N. L. R. B. v. Hekman Furniture Co.*, 207 F. 2d 561, 562 (C. A. 6); *N. L. R. B. v. J. H. Allison & Co.*, 165 F. 2d 766 (C. A. 6), certiorari denied, 335 U. S. 814; *Aluminum Ore Co. v. N. L. R. B.*, 131 F. 2d 485, 487 (C. A. 7). See also *N. L. R. B. v. Jacobs Mfg. Co.*, 196 F. 2d 680, 684 (C. A. 2); *N. L. R. B. v. New Britain Machine Co.*, 210 F. 2d 61, 62 (C. A. 2); *N. L. R. B. v. Otis Elevator Co.*, 208 F. 2d 176 (C. A. 2).⁵

In *Yawman & Erbe, supra*, 187 F. 2d at 948, the employer's refusal to supply "a list of all employees together with their current salaries" was held violative of the Act. In *Leland-Gifford, supra*, 200 F. 2d at 624, the court observed that the employer "is required to give the Union data as to the wages paid to the individual 'employees' in the unit." In *Hekman, supra*, 207 F. 2d at 562, the court held that the Board "properly directed respondent to furnish to the complaining union the data demanded concerning individual wage rates, wage ranges, and individual job classifications." Summarizing these holdings the Fourth Circuit stated in *Whitin, supra*, 217 F. 2d at 594: "It is well settled that it is an unfair labor practice within the meaning of Section 8 (a) (5) of the Act for an employer to refuse to furnish a bargaining union a list of the employees represented

⁵ *N. L. R. B. v. Boston Herald-Traveler Corp.*, 210 F. 2d 134, 136-137 (C. A. 1), is not to the contrary. In that case the court recognized that the Board could have validly ordered the employer to furnish the union with the individual salaries of the employees but it felt that the Board's order did not clearly so require and concluded that ambiguities in the order should be resolved against the Board which drafted it.

by it together with the wages paid them as such information is necessary to the proper discharge of the duties of the bargaining agent."

Characterizing this settled view of the law as "based solely on judicial ukase" (R. 77), respondent advances here contentions substantially the same as those which the courts rejected in the cases cited above. We turn to a consideration of these contentions.

A. The claim that respondent was under no obligation to engage in any negotiations as to which the requested data could be relevant

Respondent claimed before the Board that the Union was not entitled to information as to the wage rates of the employees because, according to respondent's interpretation of the contract, the wage provisions were not open for negotiation at the time that the request was made. In support of this position, respondent argues that the wage adjustment provisions in Section 21 (b) of the contract, which provided the basis for the negotiations for which the information was desired, provided merely for a mechanical adjustment of the minimum rates based upon a simple mathematical formula and that, accordingly, there was nothing in the nature of wages which it was obligated to discuss. Respondent's position appears to be that it agreed to the wage negotiations actually conducted not as a matter of right, but as a matter of grace (R. 29, 58; 86-87).

This argument is based upon a novel interpretation of the contract, contrary to the plain meaning of the reopener provision. The clause in question reads as follows:

Section 21. * * *

(b) Cost of Living Adjustment—On March 7, 1953, the basic minimum wage rates only as contained in Section 5, subsections (a) and (b) of this agreement shall be adjusted percentage-wise to *at least* the percent of change in the National BLS Index during the period of February 1, 1952 and February 1, 1953.

Example: Assume that the “new” Consumers Price Index of the Bureau of Labor Statistics increases five per cent (5%) in the specified period the said hourly rates of pay shall be increased *no less* than five per cent (5%). *A larger adjustment* in the [minimum] hourly rates may be made by mutual agreement between the parties. [R. 14–15, emphasis supplied.]

Read literally, this provision insures an adjustment of “*at least*” the percent of change shown in the B. L. S. Index. The “example” expressly states that “no less” than the percent of change in the B. L. S. Index shall be given, but that “a larger adjustment” in the hourly rate may be made “by mutual agreement between the parties.” This obviously contemplates negotiation. The Union’s request for negotiations was made pursuant to this provision. The parties did in fact undertake negotiations in consequence of this request. The adjustment finally agreed upon was almost twice that which was “at least” required. Under these circumstances, the Board could reasonably find that the Union requested the wage data for its use in negotiations conducted pursuant to the contract. (R. 58; 15–21, 83–87.)

Any suggestion that the wage-hour information may not have been relevant to these negotiations has been answered time after time by the various courts dealing with the problem. The Second Circuit disposed of an identical contention in the *Yawman* case, *supra*, 187 F. 2d at 949, with the following observation:

* * * we find it difficult to conceive a case in which current or immediately past wage rates would not be relevant during negotiations for a minimum wage scale or for increased wages.

Since the employer has an affirmative statutory duty to supply relevant wage data, his refusal to do so is not justified by the Union's failure to show the relevance of the requested information. The rule governing disclosure of data of this kind is not unlike that prevailing in discovery procedure under modern codes. There the information must be disclosed unless it plainly appears irrelevant. [Footnote omitted.] Any less lenient rule in labor disputes would greatly hamper the bargaining process, for it is virtually impossible to tell in advance whether the requested data will be relevant except in those infrequent instances in which the inquiry is patently outside the bargaining issue.

In the *Whitin* case, *supra*, 217 F. 2d at 594, in addressing itself to the same point, the court concluded that the bargaining representative "was entitled to information which would enable it to properly and understandingly perform its duties as such in the general course of bargaining and * * * such information should not necessarily be limited to that which

would be pertinent to a particular existing controversy.”

In this case, when the Union assumed its representational responsibility on behalf of respondent's employees in March 1951, it had little, if any, knowledge of respondent's wage classification system, its rate structure, or its going rates (R. 102). A year later when it commenced negotiations for its first contract, its fund of knowledge on this score was no less meager. Understandably, the Union needed and asked for the wage-hour information. Respondent chose not to accommodate it. As a result, when the Union opened negotiations in January 1953, for the cost-of-living basic minimum rate adjustment, it had no basis for knowing whether the going rates were actually in excess of the minimum rate about which it was to bargain. It lacked the means to determine the practical effect of the minimum B. L. S. adjustment on the take-home pay of the employees whom it represented. Conceivably, the bulk of the wages may have been in excess of the basic minimum, so that the B. L. S. adjustment required by the contract would have been meaningless. In that event the Union would probably have felt an obligation to press for a larger adjustment than that which it actually requested, and might well have refused the amount offered by respondent as academic or insignificant (R. 81, 83-88).

Since the information was not furnished to the Union, no one can determine precisely what effect disclosure would have had on the negotiations, but it is undeniable that it was reasonably available from

respondent's records and may have been useful in enabling the bargaining agent to gauge the extent of its obligations to its constituents. It is for these reasons that the courts have agreed with the Board that, upon proper request, an employer negotiating wages with a collective bargaining agent, must furnish full data on individual salaries without specification of utility or pertinence. *Leland-Gifford, supra*, 200 F. 2d at 624; *Hekman Furniture, supra*, 207 F. 2d 561; *Aluminum Ore, supra*, 131 F. 2d at 487.

B. The claim that the information was not relevant to the administration of the contract

Respondent also challenges the Board's finding that the requested payroll information had general relevance to the administration of the collective bargaining agreement.

In this connection, it argued before the Board that the Union surrendered whatever interest it may have had in respondent's wage and hour practices when it agreed to the management prerogative clause, authorizing respondent to establish incentive or bonus systems and to adjust wage rates above the minimum without consultation. Its position is that the Union thus "bargained itself out of position to inquire into the wage rates during the life of the contract" (R. 31, 35).

The clause upon which respondent relies provides:

Section 17. Management Functions. The management of the store and the direction of the store personnel, including but not limited to, the right to hire, suspend, layoff, dismiss, discipline, transfer, promote, or the establish-

ment of working schedules, training methods and the assignment of employees to jobs, to adopt or remove incentive or bonus systems, to adjust wage rates above those contained in this agreement, and other management functions not specifically mentioned herein, are exclusive responsibilities of the Employer (R. 13).

Respondent suggests that what this clause really means is that the Union waives its right to inquire into or question any of the employer's actions with respect to wages, whether arbitrary, inequitable, mistaken, or even discriminatory with respect to union membership or other concerted activities protected by the Act.⁶ Respondent claims that the Union has bargained away the sum total of its interest in such affairs by agreeing that respondent may set wages above the minimum without negotiation.

Nothing in the language of the contract or in the record supports this view.⁷ The clause in question does nothing more than to dispense with bargaining over the establishment of the wage standards. The Union manifestly retained a large and vital interest

⁶ It concedes, of course, that the Union retained the right to question whether or not the employees were being paid at least the basic minimum rate.

⁷ It should be noted that a waiver of a statutory right will not be inferred but must be "clear and unmistakable." *Tide Water Associated Oil Co.*, 85 N. L. R. B. 1096, 1098; *General Controls Co.*, 88 N. L. R. B. 1341, 1343; *California Portland Cement Co.*, 101 N. L. R. B. 1436, 1439; cf. *McQuay Norris Mfg. Co. v. N. L. R. B.*, 116 F. 2d 748, 751 (C. A. 7), certiorari denied, 313 U. S. 565; *New Britain*, *supra*, 210 F. 2d at 62; *Allison*, *supra*, 165 F. 2d at 768. This doctrine applies with particular force to the waiver claim here where the abdication of statutory representational responsibilities on wage-hour matters, which respondent attempts to infer, is so repugnant to the aims and purposes of the statute.

in what the wage system was, how it had been established, how it was applied, how it was changed or adjusted.

The Union's concern over possible inequities and its need for wage information may have been even greater here than in the ordinary case because the contract yielded to the respondent the sole discretion and responsibility for the fixing of wage rates above the minimum and for the establishment of all other wage details without limitation and without reference to any prescribed rate ranges or standard. The higher the degree of the employer's discretion, the greater the union's responsibility as the bargaining representative to obtain full information to protect the rights of its constituents in the administration of the contract. Otherwise, the unavailability of the information might serve to cloak distinctions between employees upon the basis of union activities.⁸ Nor is this limited type of discrimination the only basis upon which the Union may have an interest in the wage system. It has a decided interest in protecting the employees whom it represents from unfair or inequitable wage distinctions, based upon mistake, favoritism, hostility, or any other discriminatory motivation which might constitute a grievable matter.

In any event, the Union required the wage-hour information in order to determine whether the wage system established by the contract operated well enough to justify the Union in continuing in future

⁸ Section 3 of the contract provides that there shall be no discrimination because of membership or nonmembership in the Union (R. 8-9).

contracts to waive its right to bargain over wage adjustments above the minimum.

It follows that the Board was clearly reasonable in concluding that the data requested by the Union was relevant to the Union's role in administering the collective bargaining agreement, so that respondent's refusal to furnish the data violated Section 8 (a) (5) and (1) of the Act. Cf. *Leland-Gifford, supra*, 200 F. 2d at 624.

C. The claim that the contract grievance procedure prescribes the exclusive method for settling the dispute over the refusal to furnish payroll information

Before the Board respondent claimed that the grievance and arbitration provisions of the 1952 contract provided the exclusive method for the redress of unfair labor practice charges such as this one and that, accordingly, the Union's only recourse with respect to the dispute over the wage-hour information was to process the matter through the grievance procedure (R. 33-37).⁹

⁹ Section 19 of the contract provides as follows: "Section 19. Disputes. When a dispute arises as to the correct interpretation or application of any provision of this agreement, it shall be referred to a representative of the Union and the store manager. These two, after investigation, shall attempt to settle such disputes. In the event these two cannot agree, they shall jointly request the Federal Mediation and Conciliation Service to submit a panel of five (5) arbiters, one of which shall be selected by the process of elimination. Then the dispute shall be reduced to writing and submitted to the arbiter who shall decide the matter. The decision of the arbiter, within the scope of the submission, shall be final and binding on the parties hereto. The expense of any proceeding provided for herein shall be borne equally by the Employer and the Union." R. 14.)

The wage-hour information dispute was not a disagreement over the interpretation of a contract clause, as in *N. L. R. B. v. The Standard Oil Company*, 196 F. 2d 892 (C. A. 6).¹⁰ Rather, as in *N. L. R. B. v. Hekman Furniture Co.*, 207 F. 2d 561, 562 (C. A. 6), it was a disagreement over the interpretation of the statute. In no sense would it fall within the contract grievance procedure, which covered disputes "as to correct interpretation or application of any provision of this Agreement." Moreover, Section 10 (a) of the Act provides that the power of the Board to prevent the commission of unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement . . ." The Board therefore properly rejected the contention that the grievance procedure set up by the contract afforded the only means by which the Union could assert its statutory right to the wage data.

D. The claim that the information was in the possession of the Union

Respondent contends, in final justification for its refusal to honor the Union's request, that this information "was in the possession of the Union." In taking this position before the Board, respondent seemed to rely upon the fact that, at the conclusion

¹⁰ Insofar as respondent's position may be that the contract grievance procedure was intended to cover all disputes of any kind between the parties, regardless of the Union's statutory rights, the Board properly rejected it. Such a broad claim of waiver cannot conceivably find justification on the basis of a contract clause providing for settlement through the grievance procedure of "a dispute . . . as to the correct interpretation or application of any provision of this Agreement" (R. 14).

of the 1952 contract negotiations, respondent furnished to the Union a list of all employees in the unit and thereafter supplied the Union with a copy of the union-security notice acknowledged by each new employee as he was hired. In no instance, however, did it furnish the wage and hour material requested by the Union (R. 31-32; 23, 89-92).

The furnishing of the names in 1952 served the purpose of facilitating the administration of the union-security clause of the contract,¹¹ requiring new employees to join the Union within 31 days after employment. This material in no sense touched upon any detail of the wage system, rate range, going rates, incentive or bonus plan, hours or any similar wage-hour information (R. 31-32).

The apparent direction of this contention is that the bargaining representative could have asked the employees for whatever wage and hour information they may have had. However, the record is barren of suggestion that the employees, individually or collectively, had knowledge of the detailed wage-hour information to which the Union was entitled and

¹¹ Following is Section 2 of the Agreement: "Section 2. Union Membership. The Employer may select and employ without restriction; however, all new employees who are covered by this agreement shall become members of the Union within thirty-one (31) days from hiring in date. All employees covered by this Agreement who are now members or who become members of the Union shall maintain membership in the Union as a condition of continued employment, subject to the provisions of the Labor-Management Relations Act, 1947" (R. 8).

which it requested. Each employee, assuming that he understood the various deductions for tax purposes, may have known the amount of wages paid to him, but it does not appear that any employee was familiar with the wage-hour structure generally prevailing in the unit. Indeed, there is no basis for inferring that all of the employees would have cooperated in this respect. Not all of the employees were members. Some were hostile (R. 31).¹² Obviously, on this record, the employees would be an unreliable and unsatisfactory source for the kind of information which the bargaining representative requires "to enable it to properly and understandingly perform its duties." *N. L. R. B. v. Whittin Machine Works, supra*, 217 F. 2d at p. 594. Cf. *Brooks v. N. L. R. B.*, 348 U. S. 96, 103; *J. I. Case Co. v. N. L. R. B.*, 321 U. S. 332, 338-339.

In any event, the bargaining representative is not required to gather this data from the individual employees it represents. In all the cases in which this point has been raised the courts have held without exception that the bargaining representative is entitled, upon appropriate request, to have such data, where relevant, from the only authoritative source from which it can be obtained—the employer's records. *N. L. R. B. v. Yawman & Erbe Mfg. Co., supra*; *N. L. R. B. v. Hekman Furniture Co., supra*;

¹² The union-security clause of the contract did not cover employees not members of the Union on the effective date of the contract. Wages paid to the employees opposing it may have been of interest to the Union.

*N. L. R. B. v. J. H. Allison & Co., supra; Aluminum Ore Co. v. N. L. R. B., supra.*¹³

It follows that the Board properly ordered respondent to furnish to the Union the information which it was entitled to have in its representational capacity.

CONCLUSION

For the reasons stated above, the Board's order should be enforced.

Respectfully submitted.

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MARCH 1955.

¹³ See the following: *Yawman*, 89 N. L. R. B. at p. 890; *Hekman*, 101 N. L. R. B. at p. 640; *Allison*, 70 N. L. R. B. at p. 385; *Aluminum Ore*, 39 N. L. R. B. at p. 1296.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the rep-

representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14577

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

F. W. WOOLWORTH CO.,
Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER
OF NATIONAL LABOR RELATIONS BOARD

**BRIEF AND APPENDIX ON BEHALF OF
RESPONDENT, F. W. WOOLWORTH CO.**

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FILED

APR 12 1955

PAUL P. O'BRIEN, CLERK

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 14577

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

F. W. WOOLWORTH Co., *Respondent*

ON PETITION FOR ENFORCEMENT OF AN ORDER
OF NATIONAL LABOR RELATIONS BOARD

**BRIEF ON BEHALF OF RESPONDENT,
F. W. WOOLWORTH CO.**

Jurisdiction

This case is before the Court upon petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 USC, Section 141 *et seq.*)* for decree to enforce the final order issued against the Respondent by the National Labor Relations Board on July 20, 1954 (R. 64).** Jurisdiction of this Court is based on Section 10(e) of the Act. The alleged unfair labor practices occurred in San Bernardino, California, within this judicial circuit. The Board has found that Respondent was engaged in interstate commerce (R. 25).

* All references to the Act hereafter in this brief refer to the NLRA, as amended by LMRA 1947.

** References to the portion of the printed record are designated "R".

Statement of Facts

On March 11, 1952, a collective bargaining agreement was entered into between F. W. Woolworth Co. Store No. 433, herein called the "Respondent," located in San Bernardino, California, and the Retail Clerks Union, Local 1167, A.F. of L., herein called the "Union." The contract was to be in full force from the date of execution until March 5, 1954, (R. 26; 8 to 15, 16).

Section 5 of the contract established the basic minimum wage rates to be paid to all employees (R. 9). Section 17 of the contract, the management prerogative clause, reserved to the Respondent among its "exclusive responsibilities" the right to adjust the wage rates above the minimums set forth in Section 5 or, in effect, to grant merit increases (R. 13). Therefore, the actual wage above the minimum wage was to be solely in the Respondent's discretion.

In Section 21(b) the contract further provided for a wage adjustment during the life of the contract on March 7, 1953. This adjustment was to apply only to the basic minimum wage rates and was to be made in accordance with the change in the cost of living set forth in the National Bureau of Labor Statistics Index. A larger adjustment in these basic hourly minimum wage rates could be made by mutual agreement between the parties (R. 14 to 15; 26 to 27).

Several days after the execution of the agreement, upon the Union's request, the Respondent supplied it with a list of all the employees in the bargaining unit. The Union acknowledged its receipt and further requested hour and actual wage data on each employee for the period prior to the executed agreement. This information was not furnished (R. 22; 28; 81 to 82).

At the time of the execution of the collective bargaining agreement the Respondent and Union devised a form where-

by Respondent would notify the Union of new employees. Such employees were informed about joining the Union within 30 days of their employment. These notifications of new employees were received by the Union from the Respondent but were not kept as records by the Union (R. 31; 88 to 91).

On January 31, 1953 the Union requested a conference concerning the wage adjustment pursuant to Section 21(b) (R. 17; 27; 58). The BLS Index at this time showed approximately a 1.42 cents per hour increase would be required, or about 57 cents for a 40 hour week.

During the negotiations taking place in March, the Union submitted to the Respondent a proposed increase of \$2.00 per week, and on March 13th the Respondent offered an increase of \$1.00 per week (R. 27; 15 to 19, 82 to 87).

The Union, in the course of the discussions, renewed its request for actual wage, hour and classification data, this time asserting that the information was needed "for the intelligent and equitable administration of the agreement" as well as for wage adjustment. The request was refused along with other similar requests in the course of the negotiations (R. 20, 22; 28; 58; 82 to 88, 102.)

By letter dated May 1, 1953, without having received the requested information, the Union notified the Respondent that it accepted the Respondent's offer to increase the basic minimum wage to \$1.00, which was in excess of the actual cost of living increase of 57 cents as indicated above (R. 20, 21; 27; 58, 99). The Respondent acknowledged the acceptance of the increase on May 2, 1953.

Notwithstanding the reaching of the agreement the Union, on May 5, 1953, again requested the actual wage data and the Respondent did not reply (R. 22; 28; 87, 102). On June 18, 1953 the Union filed a charge with the Board, alleging, among other things, that the Respondent violated Sections

8(a)(5) and (1) of the Act by rejecting the Union's request for this payroll information.

The Board concluded that whether the Union's request for payroll information be considered as relating to the pending negotiations for a general wage adjustment or as relating to the administration of the parties' collective bargaining agreement, Respondent violated Sections 8(a)(5) and (1) of the Act by refusing to comply with the request (R. 58 to 59).

Accordingly, the Board ordered Respondent to cease and desist from the unfair labor practice found and affirmatively to furnish the Union, upon request, the name, classification, hours worked and wage rate of each employee in the appropriate unit and to post the usual notices (R. 63 to 64).

Statement of the Issue

This case involves but a single broad question of law, as follows:

Did the Respondent's refusal of the Union's request for information relating to names, compensation, hours and classifications of employees within the bargaining unit constitute a violation of Section 8(a)(1) and 8(a)(5) of the Act?

Summary of the Argument

The Board's order holding the Respondent guilty of a refusal to bargain under 8(a)(5) and (1) by a refusal to furnish requested wage data to the Union constitutes an unlawful interference by the National Labor Relations Board with terms, which were agreed upon across the bargaining table, and with rights guaranteed the individual employee under the National Labor Relations Act, as amended in 1947.

Retrospect reveals that the Union, in March 1952, agreed to a contract with a management prerogative clause, Section 17 of the Contract. The contract had the usual maximum work and minimum wage provisions and provided for a general wage adjustment based on the increased cost of living index. It also provided for any further increase that the parties might agree upon. Economic weapons of strike and lockout were barred during the wage adjustment period.

A demand for a list of all employees with their job classification and wage rates was made by the Union about the time of the cost of living wage reopening, and the request was denied. Then 8(a)(5) and (1) violations were charged by the Union for refusal to furnish the information. Nevertheless, shortly thereafter, a wage adjustment higher than the cost of living index was granted and accepted by the Union. The Board in upholding the 8(a)(5) and (1) charge acted in contravention of the fundamental principles of policy and purpose set forth by Congress in its "Findings and Statement of Policy" promulgated in connection with the new Act. A study of the substantive provisions of the Act clearly demonstrates that the Board order is a direct repudiation of the intent of Congress in passing the Act to protect rights of individual workers in their relations with labor organizations, employers and their fellow employees.

The effect of the Board order is to obligate an employer to give the labor organization information on merit increases granted to the individual employees, despite the fact that these increases are solely in the nature of a special reward for individual efforts. The Union traditionally has bargained as to minimum wages only, and, even further, has allowed the Respondent to reserve the right to control the wage increases above the minimum by the management prerogative clause (Section 17 of the Contract). In these wage increases granted above the minimum,

not only is there an exclusive right in the employer to grant such, but also there is a duty to the employee to withhold information as to such from a third party, since an individual's wage is protected by his right of privacy.

The Act emphasizes the individual rights of an employee, which the Wagner Act had not protected. The fact that individual rights are now subject to protection has not been completely overlooked by the Courts, but as is sometimes the case when a major change is adopted, the ones concerned are somewhat slow in arriving at the full meaning and application of it. The Board to date has not applied the change to wage data cases. The right of privacy has been expressly recognized by the Court in *NLRB v. Boston Herald-Traveler Corp.*, 210 F. 2d 134 (C. A. 1, 1954) a wage data case, and individual rights in general were recognized in *Elgin J. & F. R. Co. v. Burley*, 325 U. S. 711 (1945), under the Railway Labor Act which gives somewhat similar protection to the individual. However, in general the full effect of the changed policy has not been urged by parties to such questions or recognized by the Board or the Courts. In fact, so slow is the recognition of the change taking place in actual practice, that even now the only case authority available are either Wagner Act cases or cases based directly thereon.

In the problem facing the Court in the instant case, the case authority cited by the Board has been rendered inapplicable by the Act, although the Board has disregarded this in using Wagner Act precedent in this and other wage data cases. It is contended further that the Respondent is not chargeable with 8(a)(5) and (1) violations in view of the express language of the contract. Assuming the Union did have a right to the information which it unsuccessfully sought, which is denied, this right was waived when the management prerogative clause, Section 17, was included in the contract. When the Union waived its participation in merit increases, it rendered irrelevant any inquiries in this area from which it had already voluntarily excluded itself.

There is claimed no violation of the contract which might conceivably make such information relevant. Since a management prerogative clause has been declared a valid clause by the United States Supreme Court in *NLRB v. American Ins. Co.*, 343 U. S. 395 (1952), a union should not be allowed to defeat the effect of such a clause indirectly by charging an 8(a)(5) and (1) violation.

The Board fails to recognize that when the parties by agreement set up a specific machinery to resolve their differences, they should be forced to exhaust this machinery before a Board remedy is invoked. By Section 19 of the collective bargaining contract, the parties agreed to submit to the grievance and arbitration machinery any dispute arising under the interpretation of a clause of the contract. In *Timken Roller Bearing Co. v. NLRB*, 161 F. 2d 949 (C. A. 6, 1947), the Court said:

“ * * * If the law penalizes one party to the contract for standing on a bargain not itself violative of laws there may still be compulsion to bargain but the virtue of an agreement vanishes * * * The law we think does not compel this result.”

The Court then indicated that the union should have used the contract machinery before it applied for a Board remedy. The same problem is encountered here. The Board's decision vitiates any arbitration agreement and substitutes administrative ukase for the voluntary agreement between the parties.

Also, even if the unions are entitled to such information, the Union here is not entitled to the type of information requested because it is not necessary or relevant to the administration of the contract. Since the Courts have uniformly recognized a standard of relevancy in regard to the requirement to furnish wage data, it follows logically that each case will be judged on its particular set of facts.

The Board also failed to consider the type of information that the Respondent must furnish. The Board merely estab-

lished a blanket rule that all that was requested must be given. They did not distinguish what parts were relevant. In doing this, it disregarded cases establishing limitations on the form and amount of such information required to be furnished.

The *per se* right to such information of the Union adopted by the Board in its decision and order is contrary to the Board's delegated functions and to the terms of the Act. The adoption of such a rule is inconsistent with the "good faith" standard which permeates the Act, as illustrated in the *American Ins. Co.* case, *supra*. For this reason, our highest court in its mandate rejected an urged unfair labor practice *per se* rule with reference to the insistence on a management prerogative clause.

The duty to furnish such information is a flexible treatment of the substantive terms of the contract. Such substantive terms of a contract are not matters for Board determination but rather for collective bargaining. *American Ins. Co.*, *supra*. They cannot be affected indirectly by a Board order dealing with the flexible treatment or administration of these substantive terms such as was issued in the instant case. Upholding the Board's order would be tantamount to an encouraging harassment in the whole field of labor relations.

POINT I

The order of the Board violates the rights of employees under the National Labor Relations Act as amended in 1947.

The dispute between the Board and Respondent arises over the Respondent's refusal to give the Union wage information regarding the actual wage rates paid to each employee. The request for job classifications is not of im-

portance because there are only two classes of employees known in the store involved (R. 94) and petitioner makes no point of such request in its brief.

The Board's order would obligate Respondent to give the Union information on merit increases granted to individual employees along with names, hours and classifications. These merit increases are special rewards to an employee for excellent service above the contract rates set forth in the collective bargaining agreement. Respondent by contract is compelled to pay the contract rates which are the minimum rates.

This Union traditionally has bargained in its contracts for minimum wage schedules and maximum work week provisions. Where the employer reserved the right to make adjustments in pay above those minima as are found in the management prerogative clause, Section 17 of the agreement (R. 13), the employer is not compelled to reveal the amount of such merit increase to the Union. This result would be achieved indirectly if he were required to supply a list of all his employees with the actual wages being paid to each employee.

The Board refers briefly to this principle in its order (R. 63).

However, in its decision the Board has failed to take cognizance of individual rights of employees protected by the Act.

A. The Act expanded the scope of protection to include the rights of the individual employee.

The Act incorporated the intention of Congress to protect the rights of employees in their personal concerns and in their relations with employers and labor organizations.

In this respect the Act should be contrasted with the Wagner Act,* as the Findings and Declaration of Policy of that statute contained no such reference.

The Findings and Declaration of Policy of the Wagner Act are set forth in the Appendix at page 1a.

The "Short Title and Declaration of Policy" of the Taft-Hartley Act reads in part as follows:

"Section 1.(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized *if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other*, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to *protect the rights of individual employees in their relations with labor organizations* whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." (Italics added.)

Section 7 of both the Wagner Act and the Act contains a definition of the rights of employees. In the present statute Section 7 reads as follows:

* The National Labor Relations Act, 49 Stat. 449, 29 U.S.C. Secs. 151 *et seq.* before amended by the Labor Management Relations Act in 1947. Hereafter referred to as the Wagner Act.

“RIGHTS OF EMPLOYEES

“Sec. 7. Employees shall have the right to self-organization, to form, joint, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other* concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).*”

(2 Leg. Hist. of LMRA 1947, 1666)

The words italicized were added to Section 7 of the Wagner Act.

Does the fact that a union has become the bargaining representative, permit that union to compel an employer to reveal matters to aid the union to invade the privacy of a worker to a degree not permissible before the union became bargaining agent?

The answer to this question must be “no”.

The Act does not grant such a privilege. Nowhere in the Act as set forth above or in its other provisions can such an obligation on the part of the employer be found or implied, nor can such an obligation be found in the statements of the sponsors of the Act. On the contrary, unequivocal language to the opposite effect may be found.

B. The legislative history of the Act leading to its enactment emphasizes the Act's intent to safeguard individual employee rights.

In many instances in order to obtain the full meaning of a statute, or to resolve doubts as to its proper interpretation, the question will be clarified by looking at the legislators' discussions and statements in drawing and enacting

the statutes. The following excerpts of the legislators are set forth here to show the background of the Act.

“Mr. Hartley. [Co-author of the Act] * * *

“This year, this Congress gives to these working men and women their bill of rights.

* * * * *

“This bill guarantees to him:

* * * * *

“Thirteenth. The right to receive *his pay in his pay envelope*, without the employer and the union spending it for him, checking it off for union dues or for *other purposes*

* * * * *

“Fifteenth. The right to be free of threats to his family for doing things in connection with union matters that an employer or a union does not like—

* * * * *

“Sixteenth. The right to settle his own grievances with his employer—[93 Cong. Rec. 3535. Emphasis added.]

* * * * *

“Mr. McConnell. * * *

“Mr. Chairman, for the first time in any bill submitted to this House for vote, the American workingman is to be protected from the unfair labor practices of labor organizations, by provisions which, in effect constitute a bill of rights for workers.

* * * * *

“The record of the testimony, the public-opinion polls, and the mail from people throughout the length and breadth of the land, demand correction of these conditions. They cry out for the adoption of fair and equitable rules of conduct to be observed by labor and management in their relations with one another; for the protection of the rights of individual workers in their relations with labor organ-

izations and employers; and for the recognition that the public interest is paramount in labor disputes affecting commerce, which endanger the health, safety, or welfare of all our citizens. [93 Cong. Rec. 3549]

* * * * *

“Mr. Gwinn of New York. * * *

“The bill rejects the contention that organized groups may assert and force an individual to give up his basic rights for any alleged higher right of a group. The Committee finds such so-called group rights lead to the exploitation of individuals as well as of the public generally. [93 Cong. Rec. 3554. Emphasis added.]

* * * * *

Senator Taft, co-author of our present Act, on April 23, 1947 had the following to say:

“In particular I believe that in dealing with small business, with farmers, and even with the workers themselves, the labor union leaders have acquired a power which today the people resent and which inevitably has been abused. Many of our labor leaders are just as judicial and as fair as anyone could wish them to be, but extreme power, unreasonable power, cannot be granted to any group of men without a large number of them being willing to exercise it to accomplish ends which are not reasonable. Polls taken today show that union members themselves resent the power of labor union leaders. Even on the question of the closed shop, which the union leaders are most vigorously defending, the polls show that more than half their men are actually opposed to the position the leaders are taking, because apparently they feel that today they are at a great disadvantage in dealing with union leaders, and that the power given to the leaders by existing legislation is so great that *the individual is unable to exercise their right to free speech, his right to work as he pleases, and their general right to live as he pleases.*” 93 Cong. Rec. 3951 (Emphasis added.)

From these words it is clear that the Act was intended to protect rights now recognized as being inherent in the employee. Such rights are not diminished by a collective bargaining agreement and the Union's right to obtain data as to minimum wages. The right of privacy in the employee to be free from interference by either the employer or the union, therefore, is a validly asserted right. This includes a matter as confidential as the exact wage that an employee is earning, inclusive of his merit increases. This should be and is naturally a zealously protected right. As to private affairs, the United States Supreme Court has said in *Sinclair v. U. S.*, 279 U. S. 263, 292 (1929):

“It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs.”

Because of this the Respondent would violate a duty of confidence owed to his employees if this wage information were supplied to the Union. If the individual wants to waive his right of privacy, he may give the information to his union. This situation may be considered analogous to the procedure set up to allow an employer to check off an employee's dues owed to his union. The employee's consent in such a case must be obtained before this is allowed. No such waiver of the protected rights of employees has been shown in the instant case.

C. Respect for individual employee rights has been recognized by some courts paying heed to the changes in labor relations philosophy.

A right of privacy existing in the individual employee was expressly recognized in *NLRB v. Boston Herald-Traveler Corp.*, *supra*, where an employer, though he had given certain wage information to the union, omitted giving a list

of employees with which these wages could be coupled. The Court in this case expressly found the Respondent's argument setting forth a right of privacy more persuasive than the argument set forth by the Board. In so recognizing this right, the Court said at page 137:

“Furthermore, we think that if the Board had meant to invade privacy by requiring disclosure of individual names joined with actual salaries, it would have said so in unmistakable terms.”

This is the first case under the new Act formally recognizing the Act's full meaning by upholding the right of privacy.

The Board in the *Woolworth* case, significantly, though indirectly, in the following language appreciated that there were confidential rights in the data involved, but then acted inconsistently when it ignored these rights in its determination of the issue:

“Similarly, we cannot assert that the questioning of the employees was any more consonant with a desire to undermine the union than it was to respect the interests of the employees themselves in having individual wages kept as a confidential matter between employer and employee; for the dissemination of wage information of the sort requested by the union affects many other relationships than those between employee and union and employer * * * ” (R. 60).

In *Elgin J. & E. R. Co. v. Burley, supra*, the United States Supreme Court, interpreted the Railway Labor Act, which preserves the right of the individual to process his own grievances rather than the union in the absence of express authorization given to the latter by the employee. The Court exercised its power to enforce the statute as the legislators meant it to be enforced: a shield for the individual employee and a recognition of his rights. The

Court in so holding used language equally applicable to our case. At page 733 it said:

“It would be difficult to believe that Congress intended by the 1934 amendments, to submerge wholly the individual and minority interests, with all power to act concerning them, in the collective interest and agency, not only in forming the contracts which govern their employment relation, but also in giving effect to them and to all other incidents of that relation. Acceptance of such a view would require the clearest expression of purpose. For this would mean that Congress had nullified all pre-existing rights of workers to act in relation to their employment, including perhaps even the fundamental right to consult with one’s employer, except as the collective agent might permit. Apart from questions of validity, the conclusion that Congress intended such consequence could be accepted only if it were clear that no other construction would achieve the statutory aims.”

Since the Court in the *Elgin* case upholds individual rights because it could not imply their submergence from the statute, in the instant case there is no alternative but to uphold the right of privacy of the individual where the *expressed intent* of the statute is that individual rights should not be subordinated.

The Court, later in the *Elgin* case, at page 744, states:

“The collective agreement could not be effective to deprive the employees of their individual rights. Otherwise those rights would be brought within the collective bargaining power by a mere exercise of that power, contrary to the purport and effect of the Act as excepting them from its scope and reserving them to the individuals aggrieved. In view of that reservation the Act clearly does not contemplate that the rights saved may be nullified merely by agreement between the carrier and the union.”

This language is even stronger to the effect that the arrival at a collective bargaining agreement does not de-

prive the individual of rights expressly reserved to him by the statute. Applying this doctrine logically, the alleged reason given for the requested data, administration of the collective bargaining agreement, should not operate to deprive parties of their confidential rights reserved to them by the Act.

D. Authorities cited by the Board as setting forth a rule under the Act that an employer unqualifiedly must supply individual wage data to a Union on demand do not affect the instant case.

As indicated later, all the cases cited by the Board recognize the rule of relevancy as to the wage data required to be furnished the union by an employer with the exception of the *NLRB v. Whittin Machine Works*, 217 F. 2d 593 (C. A. 4, 1954). This rule requires that each fact situation must be considered separately, thus negating any possibility that one case holding could be automatically binding in another situation where the factual elements are bound to differ.

The basic cases which laid a foundation for later authority cited were based on Wagner Act thinking or were decided under the Wagner Act itself and not the present Act, which innovated the protection of the rights of the *individual* employee in his relations with labor organizations.

The case of *Aluminum Ore Co. v. NLRB*, 131 F. 2d 485 (C. A. 7, 1942), was decided under the Wagner Act. The case is also distinguishable on its facts. The issue was whether employer, "in its *negotiations* with the union, acted unilaterally and refused to furnish information it was bound, under the *intent and purport of the act*, to supply, thereby avoiding collective bargaining." (Emphasis supplied.) During the bargaining for wage increases the employer had refused to give the union certain wage data as being confidential and then instituted a unilateral wage

increase, thus excluding the union from bargaining. The Court held the Company guilty of an unfair labor practice.

This case is distinguishable on three grounds: (1) the refusal occurred during negotiations and not during the life of the contract, as in the instant case; (2) it was coupled with a unilateral wage increase which denied the union the basic right to bargain, and therefore was an independent instance of bad faith, as opposed to the *Woolworth* case where unilateral individual wage increases were authorized by the management prerogative clause; (3) it was decided under the Wagner Act where there was no express recognition of an employee's rights as an individual.

Similarly, in *NLRB v. J. H. Allison, Co.*, 165 F. 2d 766 (C. A. 6, 1948), another case decided under the Wagner Act, citing the *Aluminum Ore Co.* case, the Court held that the company was under a duty to bargain on merit increases *where the contract was silent on such* and it must supply full information with respect to those merit increases.

There is a basic distinguishing feature aside from the important fact that it was a Wagner Act decision. There was involved a merit increase concerning which the union had not waived its right to be consulted on. Because of this the unilateral increases granted certain individuals were instances of bad faith. In contrast to this, in the instant case, the Union had no right to bargain as to the amounts of merit increase as it had given the Respondent exclusive jurisdiction over such in the management prerogative clause. Therefore what was necessary in the *Allison* case is not so in the instant case.

Cases under the new Act on the question of furnishing wage data have come up in various Circuits. The majority of the cases appear in the Second Circuit. Taking them in chronological order, starting with the Second Circuit, the first case is *NLRB v. Yawman & Erbe, Mfg. Co.* 187 F. 2d 947 (C. A. 2, 1951).

In the *Yawman* case, the union sought current and past individual wage data for negotiating purposes. The Court held that despite the fact that a contract was reached while the proceedings on the charge were pending, this did not prove that the information was irrelevant when requested. The inference to be drawn by this is that a contract in hand is more favorable than the delay. For authority the Court cites the two Wagner Act cases discussed above, the *Aluminum Ore* case *supra* and the *Allison* case *supra*. No mention was made of the fact that they are Wagner Act cases and not Taft-Hartley cases.

Other distinguishing features are the fact that the information required in the *Yawman* case was for wage negotiations and not contract administration; there was no express or implied waiver by a management prerogative clause to the right to such information as in the instant case; and that no grievance procedure was alleged that might have taken this out of the jurisdiction of an unfair labor practice proceeding.

A year later, in the case of *NLRB v. Jacobs Mfg. Co.*, 196 F. 2d 680 (C. A. 2, 1952), the Court held that the refusal by a company to show its books and sales records for the preceding year to the union, to see if the company was able to grant a wage increase, was an 8(a)(5) violation. This case is clearly not in point: first, because it concerns a different type of data; second, it concerns the bargaining stage and not the administration of a contract; third, there was an over-all lack of good faith on the part of the company noted by the Court, since there was an independent refusal to bargain as required by 8(d) of the Act; fourth, no waiver was involved; and finally, again the Court did not note the changing policy of the Act and cited the *Yawman* case *supra*, which was based solely on Wagner Act cases.

In *NLRB v. Otis Elevator Co.* 208 F. 2d 176 (C. A. 2, 1953) the Court held that the company must give to the union its time study data. This case is distinguishable on

the type of information sought, and because it arose in the bargaining stage. Authorities cited by the Court were the *Allison* case (decided under the Wagner Act), the *Yawman* case (citing only Wagner Act cases as authority) and the *Jacobs* case (citing only the *Yawman* case).

Finally, in the Second Circuit, the case of *NLRB v. New Britain Machine Co.*, 210 F. 2d 61 (C. A. 2, 1954) was decided. The demand arose originally during the negotiations, and the contract agreed upon included a management prerogative clause. In holding that the company must grant the information despite the fact a contract was signed, the Court found that the union had expressly reserved its right to such information on signing and thus no waiver was involved. In contrast to this, the prerogative clause in the instant case effects a waiver which the *New Britain* case implies could be effected. It is to be noted that again the Court failed to cut loose from Wagner Act authority. It cited the *Yawman*, *Jacobs* and *Otis* cases, and in each, as shown above, the Court did not recognize the change in policy *expressly* contained in the new Act.

Authority is also cited for the Board's position in the First and Third Circuits. In the First, the case of *NLRB v. Leland-Gifford Co.*, 200 F. 2d 620 (C. A. 1, 1952), is cited. Here the Court held that the company must disclose individual wage data, although it must initially be noted that the employer tacitly conceded that he was required to give individual wage data.

The case is distinguishable on three grounds. First, the request arose for contract negotiation purposes; second, actual inequities between union and non-union employees were shown; and third, only the amount of information required to cure these inequities was involved.

As authority the Court cites the two Wagner Act cases discussed above, namely, the *Allison* case and the *Aluminum Ore* case; and two Second Circuit cases based on the afore-

mentioned cases, namely, the *Yawman* and the *Jacobs Mfg. Co.* cases, discussed above.

In the Third Circuit the authority cited in *NLRB v. Hekman Furniture Co.*, 207 F. 2d 561 (C. A. 6, 1953). The individual wage data was requested during negotiations for a wage increase during the life of the contract pursuant to a wage reopening provision and the Court upheld the Board's order to furnish it. Since the Woolworth general increase is based solely on the increase in cost of living even at the wage adjustment stage, the same necessity for the information does not arise. As to individual increases, the Woolworth Company was given exclusive right to control them. Other distinguishing points are that the Board indicated a general bad faith by the Hekman Company in bargaining, that there was no waiver of the information in the *Hekman* case, and finally, that there was no primary remedy of an arbitration procedure.

For authority the Third Circuit relied on the same two Wagner Act cases, *Allison* and *Aluminum Ore supra*, and followed them up with two cases which were based directly on these Wagner Act cases, namely, the *Yawman* and the *Leland-Gifford* cases *supra*, which were discussed above. The Courts, therefore, to date, have generally made the transition from the Wagner Act to the present Act, without having the right of privacy of an individual in his exact wage urged before them.

On the basis of the type of authority cited, it is urged that the Court disregard these cases as a precedent since they do not recognize the intent of the present Act, manifested by an altered labor relations policy. In failing by their decisions to recognize the change, the Board sustains cases as authority evolved under sections of the old Act which the new Act was intended to abrogate.

POINT II

The Respondent is not properly chargeable with an 8(a) (5) and (1) violation in view of the express language of the Contract.

For two reasons derived from the terms of the contract itself the Respondent should not be charged with an 8(a) (5) and (1) violation. The first is that the Union expressly waived any right that it had to the information sought by virtue of the contract agreed upon, and the second is that the Union is prohibited from using the Board remedy before it has exhausted the contract grievance procedure.

A. The Union waived its "Right", if any, to the information sought, by virtue of Section 17 of the Contract.

Section 17 of the collective bargaining agreement (R. 13) reads as follows:

"Management Functions. The management of the store and the direction of the store personnel, including but not limited to, the right to hire, suspend, layoff, dismiss, discipline, transfer, promote, or the establishment of working schedules, training methods, and the assignment of employees to jobs, to adopt or remove incentive or bonus systems, to adjust wage rates above those contained in this agreement, and other management functions not specifically mentioned herein, are exclusive responsibilities of the Employer."

Assuming the fact, which is denied, that the Union had a "right" to information about individual wages, upon entering into a collective bargaining agreement dated March 11, 1952 (R. 8), and more specifically by agreeing to the terms of Section 17 of that agreement, such right, if it existed at all, was waived.

The Board asserts in its brief that since the Respondent is given sole discretion in the field of merit increases such information is vital to the Union in its search for inequities. The Board thus admits the Union's disqualification to act in the area of merit increases, yet then tries to avoid the effect of the disqualification. No inequities have been alleged in the charges preferred by the Union, and, if it is a "cloak for discrimination" as the Board asserts, it is a cloak voluntarily supplied to the Respondent by the Union in their contract agreement.

The point, also advanced by the Board, that this information is necessary to justify continuing such a contract in the future, is not properly asserted at this time. This is a matter for bargaining when the present contract is terminated and negotiation for future contracts are begun.

The Union expressly consented to the granting of "merit" increases by Respondent to employees who earned them. Since the functions outlined in Section 17, including merit increases, are designated "exclusive responsibilities" of Respondent, the Union was not entitled to individual names and rates which in effect would reveal which of Respondent's employees had received merit increases and in what amounts.

There is no claim that there is any violation of the contract. Any employee who failed to receive the contract rate or who was harmed in any other way by the Company's failure to live up to the terms of the collective bargaining agreement, or the Union under such circumstances, has at all times the right to press the matter through grievance and arbitration procedure as provided in Section 19 of the agreement (R. 14).

The Supreme Court, *NLRB v. American Ins. Co.*, *supra*, stated that management properly can bargain for the inclusion of a management prerogative clause in its contract with a labor organization. Since there was agreement of

the parties on the inclusion of such clause in the form of Section 17 of the instant contract, the Board cannot now be heard to complain that the Respondent is compelled to deal with the Union as though such clause did not exist by giving the Union access to individual merit increases. The inclusion of the clause had been settled across the bargaining table, and is not open to further determination by the Board.

The governing principle is recognized by the Board in *Tide Water Associated Oil Co.*, 85 NLRB 1096 (1949) where the Board held that terms and conditions embodied in a contract were not bargainable during the life of the contract. This principle was reaffirmed by the Board in *The Jacobs Manufacturing Co.*, 94 NLRB 1214 (1951) where it was held that the terms and conditions embodied in a contract were not bargainable during the life of the contract, and further, *that terms and conditions discussed in negotiations, even though not embodied in the contract proper, were also not to be considered bargainable issues during the life of the contract.* The theory was most ably stated by Chairman Herzog at page 1228. He wrote:

“In the face of this record as to what the parties discussed and did, I believe that it would be an abuse of this Board’s mandate to throw the weight of Government sanction behind the Union’s attempt to disturb, in midterm, a bargain sealed when the original agreement was reached.

“To hold otherwise would encourage a labor organization—or, in a Section 8(b)(3) case an employer—to come back, time without number, during the term of a contract, to demand resumed discussion of issues which, although perhaps not always incorporated in the written agreement, the other party had every good reason to believe were put at rest for a definite period.” (Emphasis added.)

Therefore, since in the instant case at no time was the Union given the “right” to ascertain from Respondent the

compensation of the employees, if it ever possessed such right, it was waived through its negotiations with Respondent, culminating in the grant to Respondent of the prerogative of adjusting wage rates above the minimum set forth in the contract.

Section 8(d) of the Act states, in part, as follows:

“... the duties so imposed shall not be construed as requiring either party to *discuss* or agree to any modification of the terms and conditions contained in a contract for a fixed period if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.” (Emphasis added.)

It is urged that the tenor of Section 8(d) looks toward the reaching of an agreement. The goal of the entire Act, as set forth in the preamble and in the case law decided under the Act, is the achievement of industrial peace and *stability*. In the instant case, an agreement was reached and thus, for the entire contract term, the Respondent was entitled to peace and stability as to all the terms agreed upon. Requests for the type of information sought in the instant case were barred by the terms of Section 17 of the contract, whereby the Union voluntarily excluded itself from the area to which this information pertains, so that the Board order requiring the Respondent to furnish this information forces it to agree to a modification of the contract terms.

The Union is seeking interminable discussion of items over which it gave the Respondent exclusive control. No inequity in the treatment of any specific employee was urged which might give the Union a claim of relevancy with respect to the desired information.

The information sought could not have been necessary for reopening the contract since Section 21(b) (R. 14) called for a simple across-the-board arithmetical adjustment which did not involve the names, compensation, hours or classifications of employees in the bargaining unit. Bearing this in

mind, and the fact that the contract is one in which adjusting rates above the minimum is an exclusive responsibility of management, the Union cannot now assert that it has a right to merit increase rate information on individuals above the contract minima.

As stated above, Respondent contends that in the light of the purpose of the Act the Union has absolutely no right to such information, but if it should be held to have such right it was contracted away by the Union by the express provisions of Section 17 of the collective bargaining agreement (R. 13).

B. The unfair labor practice remedy of which the Union attempted to avail itself was barred by a clause in the collective bargaining agreement governing disputes arising under the Agreement.

The parties, after engaging in collective bargaining, negotiated an agreement which contained the following clause:

“Section 19. Disputes. When a dispute arises as to the correct interpretation or application of any provision of this agreement, it shall be referred to a representative of the Union and the store manager. These two, after investigation, shall attempt to settle such disputes. In the event these two cannot agree, they shall jointly request the Federal Mediation and Conciliation Service to submit a panel of five (5) arbiters, one of which shall be selected by the process of elimination. Then the dispute shall be reduced to writing and submitted to the arbiter who shall decide the matter. The decision of the arbiter, within the scope of the submission, shall be final and binding on the parties hereto. The expense of any proceeding provided for herein shall be borne equally by the employer and the Union” (R. 14). (Emphasis added.)

As a result of their mutually agreeing to the inclusion of this clause, the parties must avail themselves of the

grievance and arbitration machinery before choosing the medium of a Board remedy. The Union has in bad faith harassed the employer by the filing of an 8(a)(5) and (1) charge on matters which Respondent and Union had voluntarily agreed would be determined under the grievance and arbitration machinery (R. 94). This constitutes an evasion of the collective bargaining responsibility.

It is well established by the Board's own decisions that, where the parties to a collective bargaining agreement have established an arbitration procedure to resolve disputes during the period of a collective bargaining agreement, the Board will not exercise its authority to determine whether or not a violation of the agreement constitutes an unfair labor practice, unless very unusual and extenuating circumstances are presented dictating the necessity for the Board so to exercise its authority. *Consolidated Aircraft Corporation*, 47 NLRB 694, enf. as modified in other respects 141 F. 2d 785 (C. A. 9, 1944); *Timken Roller Bearing Co. v. NLRB supra*; *Midland Broadcasting Co.*, 93 NLRB 455 (1951).

There is no indication that the grievance and arbitration machinery as set up here has in the past failed in any way so as to justify the bypassing of it by either party.

In the instant case, the Respondent was given exclusive rights over incentive systems, adjustment of individual wage rates above minima contained in the agreement and the right to assign employees to jobs. Whether the Respondent's refusal to supply the requested wage data is justified involves questions as to the proper interpretation of the scope of Respondent's exclusive rights defined by the aforesaid clause. Such interpretation will permit a determination of whether the failure to supply the information requested is a violation of the Respondent's obligations. Section 19 (R. 14) of the agreement expressly provides that a dispute arising as to the correct interpretation or application of any provision shall be subject to the grievance and arbitration process.

Timken Roller Bearing Co. v. NLRB, supra, deals with the problem more specifically. Timken refused to bargain with the union about its subcontracting policy on the ground that the management prerogative clause vested exclusive control of subcontracting in the company. The Steelworkers then filed an 8(a)(5) charge against Timken for refusal to bargain collectively on subcontracting. The Sixth Circuit held that Timken was not engaged in an unfair labor practice and stated at pages 955-6:

“[T]he dispute [about subcontracting] as it finally developed, was a dispute as to the interpretation of the management clause, and the contract specifically provided that such disputes were to be settled within the grievance procedures, and if they failed, by arbitration . . . The purpose of bargaining is to reach agreement resulting in a contract binding on both parties and providing the framework within which the process of collective bargaining may be carried on . . . If the law penalizes one party to the contract for standing on a bargain not itself violative of laws, there may still be compulsion to bargain, but the virtue of agreement vanishes . . . The law, we think does not compel such result.”

In the instant case, the grievance charged was the Respondent's refusal to give wage data for which it felt the Union had asserted no valid reason and because the data had become the exclusive property of the Respondent by the management prerogative clause. Patently, this involves an interpretation of this clause to see if the Union had not barred itself from any right to the information, a matter therefore expressly subject to the grievance machinery. The Board would be undermining the stability of contracts by allowing one party to by-pass the grievance machinery and use the Board processes. This would be a reversal in the progressive trend in the field of labor relations.

There is no charge made here that the Respondent has ever refused to sit down with the Union at a time and place

convenient to both in order to confer. The collective bargaining agreement reached by the parties in 1952 was a result of the work of both sides toward a concord which would promote smooth functioning of the labor-management effort in the store. Collective bargaining is always a give-and-take proposition. There is a gain here, a sacrifice there. The "nos" will be found to be distributed as frequently as the "yeses." All the demands of both parties will, naturally, never be acceded to. It was not unusual, and surely not unlawful, for Respondent to fail to go along with the Union on its request for wage data. Respondent was, nonetheless, bargaining with the Union, whether consenting to or refusing a particular demand. The essence of bargaining is the cooperative willingness to discuss the issues at hand, not to give in to any certain request that might be made. This concept is set forth in Section 8(d) of the Act, which states:

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party *but such obligation does not compel either party to agree to a proposal or require the making of a concession:*" (Italics supplied.)

For this reason the dispute did not arise under the statute as an unfair labor practice, a refusal to bargain, but rather the dispute arose under the interpretation of the contract terms governing the right in the Union to the information. To hold otherwise would be to allow the Board to add an unfair labor practice to the statute.

That the Courts do not favor an evasion of the grievance and arbitration machinery is manifested in *Lewittes &*

Sons v. United Furniture Workers, 95 F. Supp. 851, 856 (S. D. N. Y., 1951), where the Court stated:

“The purpose of the Labor-Management Relations Act of 1947, 29 USCA §141 et seq. is to bring about peaceful solutions of labor disputes without recourse to industrial strife. Where the parties manifest a purpose to dispose of their disputes by arbitration rather than resort to economic force or pressures, their agreements should be liberally construed with a view toward the encouragement of arbitration. *Kulukindis Shipping Co. v. Amtorg Trading Corp.*, supra. The courts should be reluctant ‘to strike down a clause which appears to promote peaceful labor relations rather than otherwise.’ ”

It is clear that to uphold the Board’s decision not only will the enunciated purposes of the Act be thwarted, but such affirmation will tend to disrupt all collective bargaining agreements. Parties to such agreements will no longer seek the peaceful means of settlement established by the contract through grievance machinery, but will seek immediate recourse in the Board.

POINT III

The Union is not entitled to the type of information requested since it is not necessary for or relevant to the administration of the Contract.

The Union has requested individual wage data for the broad purpose of “administration of the contract.” It has not presented any specific reasons why the information is needed. It is not needed to negotiate or question individual wage increases, since the Union left exclusive responsibility in this field to the Respondent. Nor is it needed to negotiate a general wage increase under the wage adjustment clause, because one has already been granted and accepted

and, in any event, it was to be based on the cost of living increase.

The Board in its brief emphasizes the words "at least" and "a larger adjustment" in the Cost of Living Adjustment clause (Section 21(b)) to show that the clause contemplates negotiation. They disregard the words "*may* be made by mutual agreement by the parties." The word "may" indicates that any increase above the Cost of Living Index is purely voluntary.

"Section 21. * * *

"(b) Cost of Living Adjustment—On March 7, 1953, the basic minimum wage rates only as contained in Section 5, subsections (a) and (b) of this agreement shall be adjusted percentagewise to at least the percent of change in the National BLS Index during the period of February 1, 1952 and February 1, 1953.

"Example: Assume that the 'new' Consumers Price Index of the Bureau of Labor Statistics increases five per cent (5%) in the specified period the said hourly rates of pay shall be increased no less [Record mistake has "loss"] than five per cent (5%). A larger adjustment in the hourly rates *may* be made by mutual agreement between the parties" (R. 14-15). (Emphasis supplied.)

The clause is titled a cost of living adjustment rather than a wage reopening clause as the Board attempts to label it. It contemplates an automatic increase and not negotiations, the latter being a characteristic of a wage reopening clause. Economic weapons of strike and lockout were barred during the adjustment period.

The Board also asserts that if the Union knew the actual wage it might have felt obligated to press for higher wages at the time of the adjustment. This is exactly what the clause agreed upon intends to avoid and if the Board's argument is accepted, it makes the words "cost of living

adjustment" mere surplusage. It would eliminate the standard set up by the parties which was to work automatically.

No inequities have been alleged whereby someone might be receiving less than the minimum wage. The Union had access to information on minimum wages. Since no true need has been shown for the information, then, if a standard of relevancy is recognized, the Union's request must be refused.

A. The Courts have uniformly recognized a standard of relevancy to be applied to any requested wage information.

Tracing the Courts' attitude toward requiring employers to furnish wage information to unions, a standard of relevancy has been continuously respected. Though there has been a tendency on the part of the Board by administrative legislation to whittle away at what information an employer is allowed to withhold from the union, the Courts still have striven to keep within the standards of relevancy. While the cases are important to show that a standard of relevancy is recognized, the actual holdings in these cases are not applicable to the instant case, since their fact situations differ, which is vital to the rule of relevancy. The relevancy standard is best illustrated by examining the decisions of the Circuit Courts which have considered the question.

In the First Circuit, in *NLRB v. Leland Gifford, supra*, the Court affirmed the Board's language and stated that the requested information was "relevant" and therefore must be supplied by the company.

The relevancy standard was applied in the Second Circuit in a great number of cases, the first being *NLRB v. Yawman & Erbe, supra*. The Court, in deciding that the individual wage data must be given, said: "We approve the Board's finding that the wage information for the year

1948 was 'clearly *relevant*' to the 1949 negotiations." (Emphasis supplied.)

Again, in *NLRB v. Jacobs Mfg. Co.*, *supra*, the Court stated "As we interpret this, the requirement of disclosure will be met if the respondent produces whatever *relevant* information it has to indicate whether it can or cannot afford to comply with the Union's demands." (Emphasis supplied.)

In *NLRB v. Otis Elevator Co.*, *supra*, the Court said "We think, therefore, that the general principles of free access to information *relevant* to bargainable issues must apply," and further on in the decision Judge CLARK, when referring to the time study data required in this case, says "Clearly, then, such data falls within the standard of *relevance* set forth by us in *N.L.R.B. v. Yawman & Erbe Mfg. Co.* *supra*."

As late as February of 1954 the Second Circuit reiterated the standard of relevancy in *NLRB v. New Britain Machine Co.*, *supra*, when a Board ruling that individual wage data must be supplied was upheld on the basis of the *Yawman* case *supra*, the *Jacobs Mfg. Co.* case *supra* and the *Otis Elevator Co.* case *supra*.

In the Seventh Circuit we find one illustration, *Aluminum Ore Company v. NLRB*, *supra*, tracing the recognition of the rule. The Court held that the union was entitled to "pertinent facts constituting the wage history of its members" and "all other facts *bearing* upon what constituted fair wages and fair increases."

Finally, in the Fourth Circuit, comes the totally anomalous decision in the field wherein the Court enforced a Board order requiring the employer to furnish individual wage data without reference to the relevancy standard. This is *NLRB v. Whittin Machine Works*, *supra*.

Though the Court cites as authority all the cases standing for the relevancy standard, it then affirms the Board's step into the field of legislation when it says:

“that such information should not necessarily be limited to that which would be pertinent to a particular existing controversy.”

This language accepts the Board's newly adopted idea that relevancy need not be shown. If the Board really means to drop the relevancy standard, then it is disregarding years of its own and judicial recognition of the standard and the very cases it cites as precedent. It is urged that this case should either be interpreted as following the cases it cites approving the relevancy rule and the rest of the decision be interpreted as dicta. The alternative is that the case should be disregarded as to its holding on the relevancy rule, since it is inconsistent with existing authority and constitutes a usurpation of the power of Congress when it revokes the need for relevancy and gives in its stead a *per se* right to all wage information to the Union.

The Board has frequently recognized limitations on the amount and form of information in relation to the relevancy criteria that an employer is bound to furnish a union. In the *Yawman* case, *supra*, the Board and the Court found that the union was entitled to the 1948 wage data but not the 1947 and 1946. The latter two years' information, they held, was irrelevant for purposes requested. There was no blanket ruling that all information, in any form that the union requests, must be given.

In *The Cincinnati Steel Casting Company*, 86 NLRB 592 (1949), the union had a list of workers and the employer was willing to furnish relevant information orally. The union demanded a written list of names with individual wage data, and the employer refused to give it in this form. The Board refused to hold the employer guilty of an 8(a) (5) violation. It said the employer's offer was sufficient and

that there was no bad faith shown when the information was offered in this form.

In *Old Line Life Insurance Company of America*, 96 NLRB 499 (1951), the Board held that an employer is not required to furnish information in the exact form requested by the bargaining representative. The Board stated, quoting *The Cincinnati Steel Casting Company* case, (*supra*), "It is sufficient if the information is made available in a manner not so burdensome or time consuming as to impede the process of bargaining." It then went on to hold, since the respondent had previously given to the union substantially the same information as it requests now during the negotiations and offered to verify its accuracy, that the respondent fulfilled its statutory obligation in this respect.

It is clear, as appears from the cases just cited, that each case must be decided on its own merits. The nature of the information required to be given will depend on the particular fact situation. In the instant case, the names have been given periodically, and the Union knows the classifications and minimum rates. The Board went beyond legitimate bounds when it held the Respondent is required to divulge all the information sought at this time in the form requested.

B. The per se rule lately adopted by the Board is in excess of its delegated authority and contrary to the terms of the Act.

A long line of cases has been determined by the Board and the Courts dealing with the duty to furnish information. As indicated above, up until recently the Court had limited the duty within the boundaries of relevancy. The first appearance of a *per se* doctrine as to the refusal to give relevant wage information appeared in *Cincinnati Steel Casting Company*, *supra*, where the Board bridged a wide gap when it stated:

“As we have frequently held, an employer’s refusal, during bargaining negotiations, to furnish necessary information to the representative of his employees shows a lack of good faith in bargaining, and constitutes, *in itself*, a violation of Section 8 (a) (5) of the Act.” (Emphasis added.)

Thus, the Board attempted to legislate a new unfair labor practice into the Act, namely, the *per se* finding of refusal to furnish necessary information.

Six years later, the Board again stepped into the field of administrative legislation when it handed down the decisions in the *Whitin Machine* case, *supra*, and in the instant case. In the *Whitin* case the Board held that the union bargaining for a general wage increase was entitled to the requested individual wage data from the employer although such data was not necessary for any “particular existing controversy.” This, coupled with the *Woolworth* decision, apparently announced a broad new rule, namely that it is an employer’s statutory duty, enforceable by Board order and Court decree, to furnish a union practically any individual wage data it requests, either during negotiations or during the contract term, even though such data is not presently relevant to any existing bargaining issues and is of a private and confidential nature. It disregards the fact that the disclosure of the data—confidential to the individual—to the Union, and through it to other employees, is likely to create jealousy and unrest among employees and may result in reprisals against those who justly deserved merit increases.

This rule makes all requested information *per se* necessary, regardless of bargaining issues and regardless of its availability from other sources, such as its own members, provided only that it relates to the employment relationship. This is not in accord with the principles of the Taft-Hartley Act or the Administrative Procedure Act. Section 7 of the Administrative Procedure Act provides that the

proponent of an order should have the burden of proof to show its issuance would be proper and that the party charged have the right to defend. Relevant material should be introduced on both sides and an order should only be issued in consideration of all such evidence. Under a *per se* rule this statutory procedure is nullified.

Thus, in the instant case, when it is proved that the Respondent has refused to furnish any wage or related information requested by the Union, the decision of the Board is an automatic determination that the Respondent has committed an unfair labor practice. The need for a hearing would no longer be necessary. From the proof of refusal flows a conclusive presumption—a rule of law—that Respondent has unlawfully interfered with the rights of employees and has refused to bargain. This is an unwarranted extension of the Board's power. The Respondent would be guilty even though its relations with the Union always had been friendly and harmonious, even though it may have made concessions in current and past bargaining and reached agreement on all issues, refusing only to furnish some item of requested information which Respondent may regard as unnecessary, irrelevant, private or confidential.

A *per se* rule, when it came in conflict with a statute requiring a "good faith" standard, was expressly rejected by the Supreme Court in *NLRB v. American Ins. Co., supra*. In rejecting the Board's theory that a management prerogative clause is a *per se* violation of the duty to bargain in good faith, the Court said at page 410: "... a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case." Since furnishing information is also governed by the "good faith" standard, then a *per se* violation rule must also be rejected in this situation and the refusal should be studied only in relation to the particular facts of the case. The Court, in discussion of a *per se* rule in relation to the words

“good faith” in the statute, carefully outlines to the Board, for future interpretation, the scope of the “good faith” concept. It is pointed out by the Court that “good faith” was expressly kept in the statute by the legislators in order that the Board may apply fitting rules for particular cases. No blanket rule was intended. In thus pointing out the faults in the Board’s logic, the Court, at page 407, said:

“If the Board is correct, an employer violates the Act by bargaining for a management functions clause touching any condition of employment without regard to the traditions of bargaining in the particular industry or such other evidence of good faith as the fact in this case that respondent’s clause was offered as a counterproposal to the Union’s demand for unlimited arbitration. The Board’s argument is a technical one for it is conceded that respondent would not be guilty of an unfair labor practice if, instead of proposing a clause that removed some matters from arbitration, it simply refused in good faith to agree to the Union proposal for unlimited arbitration.”

Following this language, in the instant case, it would be inconsistent with the theory of “good faith” bargaining to label *per se* the data refusal a violation. This is true particularly where such other factors must be considered as a baseless demand for this data in light of the terms of the contract and in the light of the fact that the bargaining stage for the agreement has wholly passed. This, coupled with the very nature of the retail industry, nullifies any Union claim of lack of “good faith” on Respondent’s part, which standard the Board seeks to by-pass.

The fact that the information requested by the Union purports to be sought in the administration of and not in connection with the negotiation for the contract further negatives the Board’s holding that this is a violation by the Respondent and the use of the *Whitin* case *per se* doctrine. Again, the edict of the Court in the *American*

Ins. Co. case throws some light on this problem, when it states at pages 408-9:

“Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreement. Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board. If the latter approach is agreed upon, the extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargaining.”

Since participation in administration of the substantive terms of the contract is to be settled by collective bargaining and not by the Board, the fact that the contract involved in the instant case gives absolute rights to the Respondent on wage increases would make this requested information irrelevant as serving no administrative purpose in an area in which the administrative rights have been bargained away by the Union.

A holding of a *per se* violation would be improper under the “good faith” standard referred to above. The Supreme Court further emphasized that it intends to have the facts of each particular case examined by the Board when “good faith” is involved, when it stated at page 409:

“Accordingly, we reject the Board’s holding that bargaining for the management functions clause proposed by respondent was, *per se*, an unfair labor practice. Any fears the Board may entertain that use of management functions clauses will lead to evasion of an employer’s duty to bargain collectively as to ‘rates of pay, wages, hours and conditions of employment’ do not justify condemning all bargaining for management functions clauses covering any ‘condition of employment’ as *per se* violations of the Act. The duty to bargain collectively is to be enforced by application of the good faith bargaining

standards of Section 8(d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether.”

It is also contended that recognition of a *per se* right to the requested data will give rise to a practice interdicted by the law. It is in the nature of a harassing “fishing expedition” for evidence. The Supreme Court in *Fed. Trade Comm. v. Amer. Tobacco Co.*, 264 U. S. 298, 305 (1924), voiced its opinion of the practice when it stated:

“Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*ICC v. Brimson*, 154 US 447, 449), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime . . . It is contrary to the first principles of justice to allow a search through all the respondents’ records, relevant or irrelevant, in the hope that something will turn up.”

The *per se* rule will not tend to decrease industrial strife but, on the contrary, it will tend to increase it. The logic of the relevancy rule should not be cast aside on the basis of the Board’s convenience of not having to examine each fact situation where a dispute arises to determine if the information is relevant or not.

C. Substantive terms of the Collective Bargaining Agreement are not issues for determination by the Board.

The Supreme Court has expressly recognized that the Board shall not pass upon the desirability of the substantive terms of a contract. In *NLRB v. American Ins. Co.*, *supra*, it stated at 408-9:

“Congress provided expressly that the Board should not pass upon the desirability of the substan-

tive terms of labor agreements. Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for *more flexible treatment* of such matters is an issue for determination across the bargaining table, not by the Board.” (Emphasis added.)

The duty to furnish information requested by the Union is not a substantive term of an agreement but it is a flexible treatment or interpretation of substantive terms which are not issues for determination by the Board. There is nothing left for determination during the life of the contract in the instant case. At the bargaining table the Respondent and the Union had agreed and settled all matters pertaining to wages, hours and working conditions, including that of the management prerogative functions, Section 17 of the contract. The Respondent unequivocally was given the right “to adjust wage rates above those contained in this agreement.” The contract called for minimum wages only. Since these substantive terms were agreed upon by the parties, the Board may not in any way, directly or indirectly, change the effect of them by requiring the Respondent to give information about matters over which it was given exclusive control. Therefore, because of its interrelation with the negotiated substantive terms, the requested information is not an issue for Board determination.

Conclusion

Petitioner in its brief (pp. 12, 13) quotes the clause of the contract which provides that the right “to adopt or remove incentive or bonus systems, to adjust wage rates above those contained in this agreement * * are exclusive responsibilities of the Employer” and then attempts to destroy the recognized rights by arguing, without citation of justifying text, that there was a statutory right in the Union to the contrary and (pp. 14, 15) that the Union

required the information to determine whether it was justified "in continuing in future contracts to waive its right to bargain over wage adjustments above the minimum."

Findings by the Board on such matters of legal construction and legal relevancy should not be considered by this Court as proper findings of fact.

To uphold the Board's order alleging that the Respondent violated 8(a)(5) and (1) for refusal to furnish individual wage data would be to disregard the Congressional intention, expressed in the new Act, to safeguard the rights of the individual employees. This protection was not expressed in the Wagner Act. Flowing from these safeguards is the right of privacy which, among other things, insures an employee's freedom from interference therewith from his employer and his union. A rule requiring an employer to furnish to the union the individual wage data above the minimum set by the contract violates this right of privacy which an employee has in confidential matters such as his actual wage and coerces the employer to violate a confidence reposed in him. The Board and the Courts, to date have in wage data cases based their conclusions on the Wagner Act and precedents thereunder which did not reflect the present labor philosophy of protection of the individual employee. Such is no longer any authority and therefore should be disregarded now. Initial recognition by a Court of the right of privacy in a wage data case only recently occurred (*NLRB v. Boston Herald-Traveler Corp.*, *supra*) as the policies of the new Act begin to be put into practice.

The Union, by agreement to the management prerogative clause, waived any right which it might have to individual wage data by giving the Respondent exclusive rights in the field of merit increases. It has urged no grounds for the right to this information other than those in the area from which they voluntarily excluded themselves in the collective

bargaining agreement. There is no claim that data on minimum wages is not available to them.

The Union also by contract agreed that any dispute arising over the interpretation of a contract clause should be subject to the grievance and arbitration machinery. Since the issue of furnishing of individual wage data is based on the interpretation of the management prerogative clause, the Union should have, but did not, exhaust their contract remedies before resorting to the Board medium. The Board's order will abet evasion of the contract remedies and render grievance and arbitration clauses previously encouraged, inoperative.

If there is any privilege in the Union to obtain the wage data from the Respondent, then even under the line of cases requiring wage data to be furnished, the employer's duty is limited by the relevancy standard. The Board tried to do away with the relevancy rule and to substitute a *per se* right to individual wage data in the union regardless of its relationship to a particular existing controversy. Such a *per se* rule is contrary to the Act requiring "good faith" bargaining which insures that the particular facts of each alleged violation will be considered by the Board and is contrary to the Courts' recognition of the relevancy standard. It is, in effect, administrative legislation created for the purpose of easing the burden on the Board in passing on these cases. In its elimination of the relevancy requirements the Board simply accords the Union carte blanche in its demands upon the employer.

Since the Union has shown no relevancy in the information sought, for any proper purpose, the Board's order varies the effect of the substantive terms of the collective bargaining agreement, namely, the management prerogative clause. Such terms are matters to be determined at the collective bargaining table and not by the Board. As matters stand as a result of this decision, despite the fact that an accord has been reached by the signing of the col-

lective bargaining agreement, the Union would be permitted to indulge in endless further questioning of the employer and thus discourage the harmony encouraged by the Act in its sanction of collective bargaining agreements.

For the foregoing reasons, it is respectfully submitted that the Board's petition should be dismissed and its order vacated and set aside.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

“UNFAIR LABOR PRACTICES

“SEC. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

“(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of the section 9(a).

* * * * *

The Findings and Declaration of Policy of the Wagner Act reads as follows:

“§151. Findings and declaration of policy

“The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

“The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

“Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

“It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 14577

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

F. W. WOOLWORTH CO.,
Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER
OF NATIONAL LABOR RELATIONS BOARD

**SUPPLEMENTAL BRIEF ON BEHALF OF
RESPONDENT, F. W. WOOLWORTH CO.**

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FILED

SEP 26 1955

AUL P. O'BRIEN, CLERK

September, 1955.



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The purpose of this supplement is to invite the Court's attention to the decision of the National Labor Relations Board, rendered on August 26, 1955, in *International News Service v. American Newspaper Guild*.¹ That case, like the instant case, raises questions as to the nature and extent of the right of unions to demand from employers information as to merit wage increases.

In the cited case, as in the case at bar, when the agreement was signed, it contained a reservation to the employer of the exclusive prerogative to grant merit wage increases.

As in the case at bar, where the union asserted that the information was needed "for the intelligent and equitable

1. 113 NLRB No. 130. The principal, concurring and dissenting opinions of the members of the Board are printed in the appendix hereto.

administration of the agreement," the union had requested specific and detailed information encompassing merit wage increases granted by the employer, stating that the request was made "in order to police the existing contract, bargain intelligently, and evaluate properly our own and management's wage proposals."

In this recent decision of the Board, it is held, contrary to the holding in the instant case, that by signing an agreement reserving to the employer the exclusive prerogative of granting merit increases, the union lost any right to demand the requested information.²

The dissenting members of the Board point out that this decision is in specific and basic conflict with the prior decisions of the Board and the Courts on the question at issue.

The dissenting members of the Board in referring to the decisions handed down "in the twenty years since the Board was first established"³ also emphasize the Respondent's argument, namely, that the Board, and in many instances the Courts, have based their reasoning to support the holding that employers must furnish such data to the unions on old Wagner Act cases without in any way noting the changes in the National Labor Relations Act brought about in 1947 when the Taft-Hartley Act was enacted.⁴

2. The principle of the cited case is that "... it would be an abuse of the Board's mandate to throw the weight of government sanction behind the union's attempt, some three months later, to disturb the terms of the bargain the parties themselves achieved. The give-and-take of the bargaining table is undoubtedly a better place than the Board's offices for resolving disputes as to the type and amount of informational data parties to collective bargaining contracts must give to each other. Where, as here, the parties have themselves decided the issue at the bargaining table, the issue has been taken away from the Board and there is no need for it to interfere. To hold otherwise is to encourage one party to a bargaining agreement to resort to the Board's processes to upset the terms of a contract which the other parties to the agreement had every good reason to believe had been stabilized for a definite period." P. 11 of Appendix of Supplemental Brief.

3. Page 19 of Appendix of Supplemental Brief.

4. Pages 9 to 14, inclusive, of Respondent's Main Brief.

Respondent does not argue that this Honorable Court should follow this recent apparent change in the Board's policy as illustrated by the *International News Service* case in "weather vane" fashion. However, Respondent does believe that this complete reversal of previous Board decisions is of sufficient importance that the entire decision be printed and supplied to the Court in the attached Appendix.

Respondent argues that the minority opinion is correct in asserting that the majority in reaching their decision have departed from precedent. They have, and they should concede that they have.

It is respectfully submitted that the Board's petition should be dismissed and its order vacated and set aside.

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September, 1955.

[APPENDIX FOLLOWS]

APPENDIX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD

INTERNATIONAL NEWS SERVICE DIVISION OF
THE HEARST CORPORATION

and Case No. 2-CA-3507
AMERICAN NEWSPAPER GUILD, CIO

INTERNATIONAL NEWS PHOTOS DIVISION OF
THE HEARST CORPORATION

and Case No. 2-CA-3508
AMERICAN NEWSPAPER GUILD, CIO

DECISION AND ORDER

On October 18, 1954, Trial Examiner Max M. Goldman issued his Intermediate Report in the above-entitled consolidated proceedings finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent has not violated the Act in certain other respects and recommended dismissal of the complaint insofar as it contains allegations concerning such violations. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief, and the Union filed a reply brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

The Trial Examiner found that the Respondent violated Section 8 (a) (5) of the Act by refusing to comply with the Union's request for information showing, among other things, the specific salaries of the Respondent's employees and the amounts of merit increases the respective employees had been given. In addition to other arguments, the Respondent contends that the Union waived whatever right it may have had to receive this information by negotiating and signing its 1953-1955 bargaining agreement with the Respondent. We agree with this contention.

For a number of years, the Union has been the collective bargaining representative of employees in the Respondent's International News Service and International News Photos Divisions. In this capacity, the Union has negotiated a series of bargaining agreements covering these employees. These contracts did not provide for the payment of fixed wages and salaries. Instead, the contracts established a series of minimum rates, with each contract providing that merit increases, that is wages and salaries above the required minima, would be arrived at by negotiation between the Respondent and individual employees. This was the general scheme of the parties' contract that was effective from April 1952 to April 21, 1953. That contract included a clause, Article II, that required the Respondent to furnish the Union with a list of the employees covered, together with their experience ratings and classifications.¹

In April 1953, the parties began to negotiate the renewal of their 1952-1953 agreement. At the first session, on April 27, the Union presented a mimeographed document containing specific proposals for the new contract, including a proposal to continue the schedule of minimum rates. The

1. Article II of the 1952-1953 contract states. "Within fifteen days after the signing of this contract, the employer agrees to supply to the Guild a list of employes by bureaus who are governed by the terms of this contract, with experience rating, classifications and their designation as permanent or replacement employes. Additions to or subtractions from this list will be supplied monthly to the Guild."

Union proposed, however, a change in the practice with respect to merit increases, proposing that it be given "the right to bargain on individual merit increases," and that "The Employer shall inform the Guild of all merit increases granted in accordance with the provisions of Article IV." By Article IV, the union proposed that instead of the above described Article II of the 1952-1953 contract, the following clause be substituted:

1. Within 15 days after the signing of this contract the Employer shall supply the Guild with a list containing the following information for all employees then on the payroll:
 - (a) Name, address and telephone number.
 - (b) Date of hiring.
 - (c) Classification.
 - (d) Experience rating and experience anniversary.
 - (e) Salary, including a description of commission or bonus arrangements.
2. The Employer shall notify the Guild monthly in writing of:
 - (a) All merit increases granted by name of the employe, individual amount, and effective date.
 - (b) Step-up increases paid by name of the employe, individual amount, and effective date.
 - (c) Changes in classification and any salary changes by reason thereof.
 - (d) Resignations, retirements, deaths and any other revisions in the data listed in Section 1.
3. Within one week after the hiring of a new employe the Employer shall furnish the Guild in writing with the data specified in Section 1 for each such new employe.

In bargaining conferences that followed the April 27 meeting, the parties were unable to agree on the terms of

a new contract. A Federal Mediator was thereupon called in, and on May 20, in the latter's presence, the parties discussed the Union's proposed information clause. On May 22, the Union, acting at the Mediator's suggestion, prepared a written list of the contract subjects that the Union considered of primary importance, and those that it considered to be of lesser significance. Listed in the first category of 7 subjects, that is items of greatest weight and priority, were such disputed matters as "Grievance Procedure," "Minimum Wages," and "Severance Pay." The subject of "Information" was listed in the second category of 16 subjects, that is items of lesser weight, which included the subjects of "Preamble" and "Miscellaneous." Also on May 22, again at the Mediator's suggestion, the parties designated a two-man subcommittee, composed of Thomas R. Breslin for the Respondent, and Stephen Ripley for the Union, to continue the negotiations.

At the second meeting of the subcommittee, on June 1, Ripley agreed to abandon the Union's original proposal with respect to the furnishing of information, and to include in the new contract the above-described Article II of the 1952-1953 contract with the addition of a requirement that the Respondent would furnish the Union with the employees' addresses and experience anniversary dates. The subcommittee met again on June 8, but did not discuss the "information" matter. On June 9, the subcommittee reported to the Mediator, and listed the items as to which agreement had not been achieved. These were chiefly items that had appeared on the Union's May 22 list of priority items. The subject of "information" was not reported as an item then in dispute. On June 12, after approximately 20 meetings, the parties reached complete agreement on the terms of a new contract.

This contract, effective from April 21, 1953, to April 21, 1955, followed the scheme of the earlier agreements,

in that it established a series of minimum rates. It also reflects the Union's abandonment of its initial proposal on merit increases, for, like its predecessors, the 1953-1955 contract provides that merit increases shall be arrived at by negotiation between the Respondent and the individual employees. As executed, the 1953-1955 contract contains the "information" clause agreed upon by the negotiating subcommittee on June 1.²

Explaining the negotiations between himself and Breslin, Ripley testified that the Union abandoned its original proposal because "we were entitled to the information anyway legally." He testified that the Union conveyed the idea to the Respondent that the Union "could go to the National Labor Relations Board, or court, or wherever we had to go to get it." However, he could not recall specifically when, or to whom, such a statement was made in the course of the bargaining negotiations. Breslin testified that when Ripley agreed to the abandonment of the Union's original "information" proposal, Ripley made it clear that he was so doing because "this information was not essential or vital to the Guild." Breslin categorically denied that he or, as far as he knew, any other representative of the Respondent was told during formal bargaining session that the Union was abandoning its proposal because it was believed that legal procedure could be invoked to get the information.

As the Trial Examiner found, the Respondent complied with the 1953-1955 contract by supplying the Union with all the information that was required by the above-

2. Article III of the 1953-1955 contract provides:

Within fifteen days after the signing of this contract, the employer agrees to supply to the Guild a list of employees by bureaus who are governed by the terms of this contract, with address, experience anniversary, experience rating, classifications and their designation as permanent or replacement employees. Additions to or subtractions from this list will be supplied monthly to the Guild. Within two weeks after the hiring of a new employee, the employ shall furnish the Guild with the foregoing data.

described Article III of its terms. Nevertheless, on September 9, 1953, the Union requested the Respondent to furnish the following information:

1. The name of each employe, listed by job title and department.
2. His salary, and the dates and amounts of any regular commissions and bonuses paid him during the past year.
3. The years of experience credited to him.
4. His length of service with the company.
5. His date of hiring and anniversary date.
6. The dates and amounts of any merit increases paid him during the past year.
7. Details of the formulas used in the computation and payment of commissions, bonuses and merit increases.

The Union wrote that its request was being made "in order to police the existing contract, bargain intelligently, and evaluate properly our own and management's wage proposals." The Respondent refused the Union's request, pointing out that no grievances had been filed and that no wage proposals were then pending.

Although the Board has said repeatedly that statutory rights may be waived by collective bargaining,³ it has also said that such a waiver will not readily be inferred. It has thus required that there be "a clear and unmistakable showing" that the waiver occurred.⁴ On the facts of this case we hold that the Union "clearly and unmistakably"

3. See, for example, *Shell Oil Company, Incorporated*, 77 NLRB 1306 (right to strike); *Tidewater Associated Oil Company*, 85 NLRB 1096, 1098 (right to bargain concerning a pension plan); *Shell Oil Company*, 93 NLRB 161, 164 (right to negotiate grievances); *E. W. Scripps Company*, 94 NLRB 227, 228 (right to bargain concerning merit increases).

4. *Tidewater Association Oil Company*, *supra*. See also *E. W. Scripps Company*, *supra*; *California Portland Cement Company*, 101 NLRB 1436, 1438-1439; *Hekman Furniture Company*, 101 NLRB 631, 632.

bargained away any right it had to receive the information it requested on September 9.⁵

What the Union asked for on September 9 was almost precisely the portion of its May 27 information proposal that the Respondent had refused to assent to, and which the Union had, in fact, abandoned, in the course of the bargaining negotiations for the 1953-1955 contract. Some 20 bargaining sessions had been required before the parties had reached agreement on the terms of that contract. During several of those sessions, the parties had addressed themselves to the Union's "information" proposal, and the Union clearly revealed that it attached less importance to that proposal than it did to other matters in issue. It is significant, too, we think that not only did the Union in the course of the bargaining abandon its original "information" proposal, but it also abandoned its original proposal that it be accorded the right to bargain on individual merit increases. For, as the factual recital above shows, the Union related its proposal that it be given information on individual merit increases with its proposal that it be consulted on the granting of such increases. Thus, the Union's abandonment of the latter proposal gives a cogent reason for the relatively less weight the Union attached to its "information" proposal than to other subjects, and, indeed, tends to indicate the reason for its ultimate abandonment.

But on the facts before the Board, what the reason was that motivated the Union—whether it was because it abandoned its merit increase proposal, or whether it was, as Ripley testified, because the Union believed that legal sanction could be invoked to procure what it was seeking, or whether it was for some other reason not shown in the record—we need not here decide. Nor need we decide

5. See *General Controls Company*, 88 NLRB 1341, 1342; *Hughes Tool Company*, 100 NLRB 208, 209; *Avco Manufacturing Corporation*, 111 NLRB No. 118, pp. 2-5.

whether or not the Union's September 9 request was revelant or necessary for the reasons it advanced when it made the request. For the controlling fact that clearly emerges from the entire course of the parties' bargaining is that the Union, having proposed an "information" clause for the 1953-1955 contract more inclusive than the one in the 1952-1953 contract, consciously yielded in the face of the Respondent's objections, and accepted something less than it originally proposed. What the parties ultimately agreed upon, moreover, was the "information" clause of the 1952-1953 contract modified to include a part of the Union's original proposal. And this agreement was in fact written into the express terms of the bargaining contract the parties executed.

In these circumstances, we believe it would be an abuse of the Board's mandate to throw the weight of Government sanction behind the Union's attempt, some three months later, to disturb the terms of the bargain the parties themselves achieved. The give and take of the bargaining table is undoubtedly a better place than the Board's offices for resolving disputes as to the type and amount of informational data parties to collective bargaining contracts must give to each other. Where, as here, the parties have themselves decided the issue at the bargaining table, the issue has been taken away from the Board and there is no need for it to interfere. To hold otherwise is to encourage one party to a bargaining agreement to resort to the Board's processes to upset the terms of a contract which the other party to the agreement had every good reason to believe had been stabilized for a definite period.⁶

Members Murdock and Peterson state in their dissent that, in reaching our decision herein, we have departed from precedent. We have not. The issue of whether there

6. See Chairman Herzog's concurring opinion in *The Jacobs Manufacturing Company*, 94 NLRB 1214, 1227-1228.

has been "a clear and unmistakable" waiver is necessarily a question of fact that can be decided only upon the specific facts of the particular case. Like our dissenting colleagues we have read and carefully analyzed and compared the cases cited by them in their dissent. In our considered judgment, each of those cases is factually distinguishable from the instant case. No case relied upon by Members Murdock and Peterson involved a situation, as here, in which it was shown that the parties not only bargained *pro* and *con* with respect to an information clause, but also, having come to terms on the matter, inserted in their contract, not what one party originally sought, but a measure that compromised their differences. It follows, therefore, that the cases relied upon by Members Murdock and Peterson cannot be controlling here.

Accordingly, as it appears that the Respondent supplied the information to which the Union could lay claim under the 1953-1955 contract, and as a majority of the Board so agrees, we shall dismiss the complaints against the Respondent.

ORDER

Upon the entire record in these cases, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaints herein against International News Service and International News Photos Divisions of the Hearst Corporation be, and they hereby are, dismissed.

Dated, August 26, 1955, Washington, D. C.

GUY FARMER, *Chairman*

PHILIP RAY RODGERS, *Member*

NATIONAL LABOR RELATIONS BOARD

BOYD LEEDOM, *Member*, concurring:

I concur that the complaints should be dismissed but I do not believe it is necessary to reach the problem of waiver.

Considering the time of the demand for the information, with respect to the wage reopening provision of the contract, and the failure to establish specific need for the data, in the absence of apparent necessity at the time of the request, I would dismiss. Lacking such a showing, the Employer's failure to supply information is not failure to bargain in good faith.

Dated, August 26, 1955, Washington, D. C.

BOYD LEEDOM, *Member*

NATIONAL LABOR RELATIONS BOARD

ABE MURDOCK and IVAR H. PETERSON, *Members*, dissenting:

In these cases Chairman Farmer and Member Rodgers, with the concurrence of Member Leedom, have decided that this Employer did not violate Section 8 (a) (5) of the Act by refusing to furnish a Union with wage data concerning the employees it represents. In so deciding they have deprived this Union of necessary and relevant information essential to the intelligent representation of these employees. For the first time in the history of Board and court decisions in this area of labor relations, the assertion is made that to require the employer to furnish more information than the amount specified in a contract would be "an abuse of the Board's mandate." According to Chairman Farmer and Member Rodgers, the "give and take of the bargaining table" is a "better place than the Board's offices" to resolve disputes of this nature. Indeed, they hold that where the parties have contracted concerning informational data "the issue has been taken away

from the Board and there is no need for it to interfere.” These conclusions are not only novel; in our opinion, they present a basic misconception of the Board’s function in administering this Act. Is it an abuse of the Board’s mandate to require an employer to furnish a union with information which the latter finds essential to effectively exercise its duty of representing employees under Section 9 (a) of the Act? In other cases Chairman Farmer⁷ and Member Rodgers⁸ themselves have described to the Board and Court established rule that it is the obligation of an employer to furnish such information to a Union to make collective bargaining effective. Did the Board abuse its mandate in those cases too? Why were the employers in these cases ordered to furnish the requested information if the bargaining table was the better place to resolve those disputes? Why should the Board have interfered there, but not here? Chairman Farmer and Member Rodgers are saying, in effect, to this Union: “You now have half the tools you need to carry out your obligations to these employees. You did not successfully insist at the bargaining table, a better place than the Board’s offices, that you be given all of them; it is therefore your own fault and not the Board’s if you cannot represent these employees effectively.”

It has been the consistent position of the Board and the courts that the furnishing of wage information to a Union is a *prerequisite* to effective collective bargaining. Certainly, it is the business of this Board to see to it that the Union be furnished this data, which is in the employer’s possession and can be supplied without the imposition of an unreasonable or undue burden. Otherwise the Board will have failed to carry out the Congressional mandate to foster

7. *Boston Herald-Traveler Corporation*, 110 NLRB 2097, enforced 223 F. 2d 58 (C. A. 2); *Whitin Machine Works*, 108 NLRB 1537, enforced 217 F. 2d 593 (C. A. 4), cert. denied 349 U.S. 905; *The Item Company*, 108 NLRB 1634, enforced 220 F. 2d 956 (C. A. 5).

8. *Utica Observer-Dispatch, Inc.*, 111 NLRB No. 6; *Whitin Machine Works*, *supra*; *The Item Company*, *supra*.

and encourage collective bargaining. In our view, this mandate does not permit the Board to stand by with arms folded and solemnly declare that there is "no need to interfere" when one of the parties is crippled by the absence of information without which it cannot fulfill its role in collective bargaining.

To support their finding that the Employer did not violate Section 8 (a) (5) of the Act, Chairman Farmer and Member Rodgers hold that the Union "bargained away" or "abandoned" its right to this information in the course of negotiating and executing a contract. The extended discussion of the parties' negotiations for a new contract in 1953, which appears in their decision, reveals that the Union originally requested complete informational data, but finally executed a contract in which the Employer agreed to furnish the Union with some but not all of such data. Chairman Farmer and Member Rodgers concede that there is some evidence in the record that the Union did not insist that the Employer agree to furnish all the information because it believed that the Employer was legally obligated to furnish such information, whether or not the contract so provided. There is, in addition, evidence in the record, contrary to the suggestion of Chairman Farmer and Member Rodgers, that the Union's position as to this issue was specifically made known to the Employer. Stephen Ripley, a Union negotiator, testified that he had submitted a brief to Federal Mediator Bernard J. Forman, which set forth the Union's position that it had a legal right to such information. On cross-examination Respondent's negotiator, Thomas J. Breslin, admitted that he had read the Union's brief at the time it was presented to the mediator and that he was therefore aware of the Union's position that it had a right, apart from any contractual agreement, to be provided with the desired information.

The Board and the courts have uniformly recognized that to deny a union information necessary to its role as

bargaining representative would create a serious impediment to the processes of collective bargaining.⁹ Such a right has been held to be statutory in nature,¹⁰ deriving from the union's authority under Section 9 (a) of the Act to represent employees and the employer's corollary duty under Section 8 (a) (5) to engage in good faith collective bargaining. Numerous defenses, including the argument that the Union had "waived" its right to such information, have been rejected time and again.¹¹ The Board has held, with judicial approval, that any purported waiver by a union of so important and necessary a right must be a "specific" waiver in language "clear and unmistakable" or "clear and unequivocal."¹² Chairman Farmer and Member Rodgers, however, find solely on the basis of the execution of a contract containing an agreement that the employer would furnish less information than was originally requested, that the union "clearly and unmistakably" waived its right to the additional necessary information. Obviously they would substitute what at best is an implied waiver from silence or ambiguous conduct for the judicially approved doctrine that nothing less than a "clear and unequivocal" waiver will suffice. We believe that this decision is on its face wrong.

Our view that there was no clear waiver in this case is supported by the decisions of numerous Circuit Courts of

9. *Utica Observer-Dispatch, Inc.*, *supra*; *Boston Herald-Traveler Corporation*, *supra*; *The Item Company*, *supra*; *Whitin Machine Works*, *supra*; *Leland-Gifford Company*, 95 NLRB 1306, enforced 200 F. 2d 620 (C. A. 1); *Yawman & Erbe Manufacturing Company*, 89 NLRB 881, enforced 187 F. 2d 947 (C. A. 2); *N.L.R.B. v. J. H. Allison & Company*, 165 F. 2d 766 (C. A. 6), cert. denied 335 U. S. 905.

10. *N.L.R.B. v. The Item Company*, *supra*; *N.L.R.B. v. Yawman & Erbe Manufacturing Company*, *supra*; *California Portland Cement Company*, 101 NLRB 1433, 1439.

11. *Utica Observer-Dispatch, Inc.*, *supra*; *Post Publishing Co.*, 102 NLRB 648; *Hastings & Sons Publishing Company*, 102 NLRB 708; *Hekman Furniture Co.*, 101 NLRB 631, enforced 207 F. 2d 561 (C. A. 6); *N.L.R.B. v. Leland-Gifford Co.*, *supra*.

12. *N.L.R.B. v. The Item Company*, *supra*; *California Portland Cement Company*, *supra*; *Tide Water Associated Oil Company*, 85 NLRB 1096; *E. W. Scripps Company*, 94 NLRB 227; *General Controls Co.*, 88 NLRB 1341.

Appeal. Rejecting a similar contention, the Sixth Circuit Court of Appeals held in the *Allison* decision:

Nor do we see logical justification in the view that in entering into a collective bargaining agreement for a new year, even though the contract was silent upon a controverted matter, the union should be held to have waived any rights secured under the Act, including its right to have a say-so as to so-called merit increases. Such interpretation would seem to be disruptive rather than fostering in its effect upon collective bargaining, the national desideratum disclosed in the broad terms of the first section of the National Labor Relations Act.

In *N.L.R.B. v. Otis Elevator Company*,¹³ the Second Circuit Court of Appeals set forth a contractual provision in which the employer agreed to furnish specific information relating to time study statistics. The Court then held as follows:

Respondent . . . contends that this sets forth his entire obligation to impart information and constitutes a waiver of any additional union right. We cannot agree. In the atmosphere of collective bargaining in labor relations it is reasonable to require that the parties set forth the terms on which they have agreed. But *the drawing of broad inferences of waiver from their silence would be disruptive rather than fostering amicable relations.* [Citing *N.L.R.B. v. J .H. Allison Company, supra.*] The language quoted from the contract carries the implication of a general intent to keep the operator informed as to the development of time studies affecting him. In the absence of an express provision this should not be read as limiting requests on behalf of the employees for information, but rather as in general supporting them. We think, therefore, that the general principle of free access to information relevant to bargainable issues must apply. (Emphasis supplied.)

13. 208 F. 2nd 176 (C. A. 2).

In the *Leland-Gifford* case¹⁴ the Union, as in the instant cases, had requested complete data for bargaining purposes and was supplied by the Company with something less in contract form. In that case the parties had even included a clause in the contract to the effect that the agreement represented the entire agreement between the parties, as indicated below. Nevertheless, the Board held:

The Respondent's contention that the Union bargained away the right to request the individual wage data is apparently based on the fact that *the 1948 contract contained provisions requiring the disclosure by the Respondent of certain information* (not including that in issue here), and a further clause which stated, "This agreement contains the entire agreement between the parties and no matters shall be considered which are covered by the written provisions stated herein." We need not decide, as the Trial Examiner did, whether this clause was operative during the period in 1950 covered by the complaint herein, for we are satisfied that, in any event, *the clause in question was not intended, and cannot be construed, as a waiver by the Union of its right to obtain data necessary to the effective administration of a contract.* (Emphasis supplied except on phrase "right to obtain data.")

The First Circuit Court of Appeals,¹⁵ finding that the Respondent's duty to furnish information under the circumstances of that case did not "require extended consideration," enforced this portion of the Board's Order, citing numerous precedents. Again in *N.L.R.B. v. Yawman & Erbe Manufacturing Company*¹⁶ the Second Circuit Court of Appeals held that the Union had a right to such information even though a contract had been executed without its disclosure:

Nor is our determination that the information was relevant affected by the subsequent execution of a

14. *Leland-Gifford Company, supra.*

15. *N.L.R.B. v. Leland-Gifford Company, supra.*

16. *Supra.*

contract without disclosure. The most that can be inferred from the Union's action is that the advantages of a contract in hand outweigh those which the Union might later obtain when all relevant information would be available to it.

In the twenty years since the Board was first established and entrusted with the function of administering this Act, no Board or court decision has found a waiver of the Union's right to such information on the ground that the Union was able to secure some, but not all, of the necessary information through voluntary agreement of the employer; rather such a doctrine has been specifically rejected by Courts of Appeal. Information of this nature is the essential means by which a Union may become sufficiently informed to bargain about substantive matters in discharging its duties under Section 9 (a) of the Act as the bargaining representative of these employees. We do not believe that the Board should deprive a union of so vital an instrument to effectuate this statutory purpose. We would not do so unless the union in clear and unequivocal language had agreed, as it has not in these cases, to waive its right under the statute. We believe it too late in the day to ignore or overrule all judicial authority on this doctrine.

In his concurring opinion Member Leedom takes the position that he would dismiss the complaint without considering whether or not the Union had waived its right to the information requested. He cites neither Board nor court decisions in support of his conclusion that "the employer's failure to supply information is not failure to bargain in good faith." That conclusion is, we believe, contrary to long established law in this area of labor relations, including the most recent decisions of the First, Second, Fourth and Fifth Circuit Courts of Appeal.

It appears to be Member Leedom's position that the Employer was not required to supply the data requested on the grounds (1) the Union's request for information was not timely with respect to the wage reopening clause; (2) the Union failed to establish a "specific need" for the data. A third phrase, "the absence of apparent necessity at the time of the request," would seem to be included in the two grounds already stated.

As set forth in the Intermediate Report, the information requested by the Union related to the names, salaries, and merit increases of the employees it represented. We do not understand Member Leedom's decision as challenging the relevancy of this information to bargainable issues; nor does he dispute the settled precedents cited above, holding that a union has a statutory right to such information. He exonerates the Employer from failure to cooperate in collective bargaining because, it appears, the Union did not ask for the information at a time when it needed it for bargaining purposes. The record shows that the 1953-1955 contract contained a provision permitting either party to reopen the contract on the issue of wages on or before February 21, 1954. It is apparently this reopening clause to which Member Leedom refers when he finds that the Union's request for wage information on September 9, 1953, some five months before the contract could be reopened, was "not timely." We have, we believe, reviewed every Board and Court case involving the issue of an employer's duty under Section 8 (a) (5) of the Act to furnish information data to a union representing its employees. As indicated above, numerous and varied defenses have been raised by employers to support their refusal to supply such information. In only one of those cases, however, has the defense been specifically raised that a union's request for information was not timely because it was made some months before actual contract negotiations were to begin. That case is *Hastings & Sons Publishing Company*.¹⁷ There

17. *Supra*.

the contracts in issue were to terminate on April 6, 1952. The union originally requested information on July 13, 1951, and the employer refused the request on August 17, 1951. The Board affirmed the Trial Examiner's rejection of the Respondent's contention that requests for information would be timely only if made during the 60 day period prior to the termination of the contract:

Nor do I find merit to the Respondent's contention that the requests for information were inappropriate and proper only during the 60 days prior to the termination of the contract, since such information at reasonable times during the contract year would enable the Union as the statutory bargaining representative to determine whether the contract is being fairly and impartially administered. The policing of an agreement is an essential function of the Union.¹⁸

The rarity of defenses of this nature becomes understandable upon examination of the leading decisions dealing with this issue. On June 6, 1955, the First Circuit Court of Appeals handed down its decision in *Boston-Herald Travelers Corporation v. N.L.R.B.*¹⁹ The court in that case quoted as the rule "consonant with and best calculated to effectuate the purpose of the Act" that set forth in the concurring opinion of Chairman Farmer in the *Whitin*²⁰ case, in which he held:

. . . I would, therefore, hold that, short of evidence that union requests for wage data are used as an harassing tactic and not in a good faith effort to secure pertinent bargaining information, the employer has a continuing obligation to submit such data upon request to the bargaining agent of his employees I am convinced, after careful consideration of the import of the problem on the collective bargaining process, that this broad rule is necessary to avoid

18. *Ibid*, at page 715.

19. 223 F. 2d 58 (C. A. 1).

20. *Supra*, at page 1541.

the endless bickering and jockeying which has heretofore been characteristic of union demands and employer reaction to requests by unions for wage and related information. The unusually large number of cases coming before the Board involving this issue demonstrates the disturbing effect upon collective bargaining of the disagreements which arise as to whether particular wage information sought by the bargaining agent is sufficiently relevant to particular bargaining issues. *I conceive the proper rule to be that wage and related information pertaining to employees in the bargaining unit should, upon request, be made available to the bargaining agent without regard to its immediate relationship to the negotiation or administration of the collective bargaining agreement.* (Emphasis supplied.)

In *N.L.R.B. v. New Britain Machine Company*²¹ the Second Circuit Court of Appeals affirmed the Board's finding that the employer had violated Section 8 (a) (5) of the Act by refusing to furnish data to a union. In that case the Board affirmed the Trial Examiner's holding:²²

Unless the information is 'plainly irrelevant' [Citing *Yawman & Erbe Mfg. Co., supra*] it must be submitted. The information has been held essential and relevant not only in the negotiation of wage questions, but also to protect the Union's 'proper interest in the manner in which an employer administers an existing contract,' and for 'policing' it. [Citing *Leland Gifford Co., supra; California Portland Cement, supra.*]

In the *Whitin*²³ case the Fourth Circuit Court of Appeals cited with approval the Board's decision. The quoted portion included the Board majority's agreement with the concurring opinion of Chairman Farmer:

... In this respect, we agree with the statement of our concurring colleague, that in these cases it is suffi-

21. 210 F. 2d 61 (C. A. 2).

22. *New Britain Machine Company*, 105 NLRB 646, 650.

23. *Supra*.

cient that the information sought by the union is related to the issues involved in collective bargaining, *and that no specific need as to a particular issue must be shown.* (Emphasis supplied.)

Again, on April 6, 1955, the Fifth Circuit Court of Appeals held in *N.L.R.B. v. The Item Company*²⁴ as follows:

We agree with the Fourth Circuit in the *Whitin* case, *supra*, that wage data appropriate for disclosure to a statutory bargaining representative in such instances 'should not necessarily be limited to that which would be pertinent to a particular existing controversy' . . . , but includes all information, such as that here sought, which appears reasonably necessary for 'the policing of the administration of any contract.' [Citing *N.L.R.B. v. Leland-Gifford Co.*, *supra*.]

The above cases are illustrative of the well settled rule, appearing in numerous cases throughout the history of the Board, that a union may request and an employer is obliged to furnish necessary information data *before, during or after* actual contract negotiations so long as the information is relevant to bargainable issues or policing the contract. In its letter of September 9 the Union stated that the information was requested in order "to police the existing contract, bargain intelligently, and evaluate properly our own and management's wage proposals." We believe that the Union's need for the information at the time it was requested is apparent on both grounds although, as the cases indicate, it is sufficient that the information was required to police the existing contract. The Respondent was asked to furnish the information by October 15, 1953. Certainly, four months is not too long a period to study the facts, hold membership meetings, and marshall arguments in support of ultimate bargaining positions.

24. *Supra*

We are convinced, for the reasons set forth above, that there was neither a waiver by the Union of its right to the information requested, as Chairman Farmer and Member Rodgers find, nor was the request untimely, as Member Leedom finds. We therefore dissent.

Dated, August 26, 1955, Washington, D. C.

ABE MURDOCK, *Member*

IVAR H. PETERSON, *Member*

NATIONAL LABOR RELATIONS BOARD

No. 14644

United States
Court of Appeals
for the Ninth Circuit

See Vol. 2924

CITIZENS UTILITIES COMPANY, a Corporation,

Appellant,

vs.

E. G. NIELSON, LLOYD G. HUDLOW,
ALOYSIUS L. KUNKEL, HOWARD C.
SCHRIBER, and ALBERT A. HAMILTON,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona

FILED

APR 11 1955



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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DOCKET ENTRIES

Filings—Proceedings

1954

- Dec. 24— 1. File Plaintiff's Complaint.
- Dec. 24— 2. Enter and file Temporary Restraining Order and Order to Show Cause Returnable January 3, 1955, at 2:00 p.m.
- Dec. 24— 3. File Plaintiff's Bond for Temporary Restraining Order in the sum of \$1,000 with the Hartford Accident and Indemnity Co., as surety thereon.
- Dec. 31— Order continue return day on Order to Show Cause heretofore entered, until Monday, January 17, 1955, at 3:00 p.m., at Tucson, Arizona, and that Temporary Restraining Order remain in force until said time, and further order Pltf's bond on temporary restraining order be increased to the sum of \$10,000, said bond to be approved by the Clerk.

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- Jan. 3— 4. File Plaintiff's Bond for Temporary Restraining Order in the sum of \$10,000, with the Hartford Accident and Indemnity Co., as surety thereon and cc Temporary Restraining Order.

1955

- Jan. 4— 5. File Summons and cc Temporary Restraining Order returned by Marshal showing service on Aloysius L. Kunkle (Doe 2) and Howard Shriber (Doe 2), and on Albert E. Hamilton, Lloyd J. Hudlow, Fredrich C. Keller and A. E. Benson.
- Jan. 11— 6. File Motion to Dismiss of defendants Aloysius L. Kunkel and Howard C. Schriber and Notice for hearing Jan. 17, 1955, at 3:00 o'clock p.m. at Tucson and Memorandum in support thereof and Affidavits.
- Jan. 11— 7. File Motion to Dismiss or to Quash Service of defendant Albert E. Hamilton and Notice for hearing January 17, 1955, at 3:00 o'clock p.m. at Tucson and Memorandum in support thereof.
- Jan. 11— 8. File Motion to Dismiss and to Vacate Temp. Restr. Order of defendants E. A. Benson, Project Manager, Parker Davis Project, Bureau of Reclamation, Dept. of the Interior, and Frederick C. Keller, Asst. Engineer at Davis Dam, Bureau of Reclamation, Dept. of Interior, and Notice for hearing Jan. 17, 1955, at 3:00 o'clock p.m. at Tucson.
- Jan. 11— 9. File Memorandum in Support of Motion of Defts. E. A. Benson and Frederick C. Keller and Affidavits.

1955

- Jan. 11—10. File Motion Quash Service and to Dismiss of E. G. Nielson, Regional Director of Bureau of Reclamation, Region No. III, U. S. Dept. of Interior, and Lloyd G. Hudlow, Project Engineer, U. S. Bureau of Reclamation, U. S. Dept. of Interior.
- Jan. 11—11. File Memorandum in Support of the Motion of defendants E. G. Nielson and Lloyd G. Hudlow.
- Jan. 11—12. File Notice of hearing of Motion to Dismiss of defendants E. G. Nielson, Lloyd G. Hudlow, E. A. Benson and Frederick C. Keller for hearing Jan. 17, 1955, at 3:00 o'clock p.m. at Tucson.
- Jan. 17— Joseph Jenckes, Jr., and Earl Carroll appear for pltf.; Everett Gordon present for defts. Nielson, Hudlow, Benson and Keller. Mo. Gordon, order admit Darrell P. McCrory to practice specially in this case. Mo. Milton Cole, order admit John H. Mathews specially to practice in this case. McCrory and Mathews pres. for defts. Kunkel, Schriber and Hamilton. Mo. to dismiss of defts. Kunkel and Schriber; mo. to dismiss or to quash service of debt. Hamilton; mo.

1955

to dismiss and to vacate temporary restraining order of deft. Benson and mo. to quash service and to dismiss of deft. Nielson for hearing. Said motions argued, submitted and taken under advisement, ruling reserved to Wednesday, January 19, 1955, at 2 p.m. On stip. of counsel, order dismiss as to defts. Benson and Keller.

Jan. 19— On for ruling on defts'. motions. Jos. Jenckes, Jr., pres. for pltf.; John H. Mathews and Darrell McCrory pres. for defts. Kunkel, Schriber & Hamilton; Everett Gordon pres. for defts. Nielson and Hudlow. Order grant motions of defts. Nielson and Hudlow. Order grant motions of defts. Nielson, Hudlow and Hamilton to quash purported service of process; order grant motions of defendants to dismiss on grounds that this is in reality a suit against the United States; order grant motions to dismiss on grounds Secretary of Interior is an indispensable party to action.

Jan. 20—13. File Pltfs'. Memorandum in Opposition to Deft's. Motions to Dismiss.

Jan. 21—14. File Reporter's Transcript of Proceedings of Hearing.

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- Jan. 21— Order dismiss complaint on grounds and for reasons (1) the suit is in reality a suit against the U. S. which has not consented to be sued; (2) the Secretary of the Interior is an indispensable party. Fur. order quash restraining order issued 2/24/54.
(Entered in Civil Docket 1/21/55).
- Jan. 21— Mail notice to counsel.
- Jan. 24—15. File pltf's. Motion for Restoration & Continuance of Restraining Order Pending Appeal .
- Jan. 24— Order that time for hearing on pltf's. Mo. for Restoration & Continuance of Restraining Order is shortened & motion is set for hearing on Jan. 31, 1955, at 2 p.m. at Tucson.
- Jan. 24— Mail notice to counsel.
- Jan. 24—16. File pltf's. Notice of Appeal.
- Jan. 24— Mail copies of Notice of Appeal to Roger Arnebergh, City Atty., John H. Mathews, Deputy City Atty., Darrell McCrory, Deputy City Atty., 207 South Broadway, Los Angeles, Calif., and Everett Gordon, Ass't. U. S. Atty., U. S. Courthouse, Phoenix, Arizona.
- Jan. 24—17. File Cost Bond in sum of \$250. with Hartford Accident & Indemnity Co.

1955

- Jan. 24—18. File appellant's Designation of Contents of Record.
- Jan. 31—19. File Points & Authorities of defts. Aloysius L. Kunkel & Howard C. Schriber in Opposition to Pltf's. Motion to Restore Temporary Restraining Order.
- Jan. 31—20. File Affidavit of E. A. Benson, Project Mgr., Parker-Davis Project.
- Jan. 31— For hearing on Pltf's. Mo. for Restoration & Cont. of Restraining Order pending Appeal. Joseph Jenckes pres. for pltf.; John H. Mathews & Darrell B. McCrory pres. for defts. Kunkel & Schriber; Everett Gordon pres. for defts. Nielson, Hamilton & Hudlow; Patricia Todd sworn as Court Reporter. Mo. argued; Order deny Pltf's. Mo. for Restoration & Continuance of Restraining Order Pending Appeal.
- Feb. 4— Order Patricia Todd permitted to withdraw case file to be returned before close of business this day.
- Feb. 5— Mail Record on Appeal to Clerk of Court of Appeals for the Ninth Circuit at San Francisco and mail copies of Clerk's Certificate and letter of transmittal of record to Court of Appeals to counsel.

In the United States District Court
for the District of Arizona

Civil—427 Pct.

CITIZENS UTILITIES COMPANY, a Corpora-
tion,

Plaintiff,

vs.

E. G. NIELSON, JOHN DOE 1, JOHN DOE 2,
JOHN DOE 3, JOHN DOE 4, JOHN DOE 5,
JOHN DOE 6, JOHN DOE 7, JOHN DOE 8,
and JOHN DOE 9,

Defendants.

COMPLAINT

Comes now the plaintiff and for cause of action
against defendants alleges:

I.

Plaintiff is a corporation organized and existing
under the laws of the State of Delaware and duly
qualified to conduct its corporate business in the
State of Arizona. Defendant, E. G. Nielson, is a
resident of the State of Nevada and at all times
mentioned herein was and is now Regional Director
of the Bureau of Reclamation, Region No. III,
United States Department of the Interior, and as
such Regional Director is in responsible charge of
generation and distribution of electrical energy at
Hoover Dam and Power Plant located in the Colo-
rado River partially in the States of Nevada and

Arizona. Defendants John Doe 1 to 9, inclusive, are residents either of the State of Nevada or of the State of Arizona and are engaged in employment at and about Hoover Dam and Power Plant subject to the supervision, direction and control of defendant E. G. Nielson. That John Doe 1 to 9 are not the true names of said employees. The true names of such persons being unknown to plaintiff at this time. As soon as the true names of such persons are determined, the same will be substituted for the fictitious names herein alleged.

II.

The grounds upon which the jurisdiction of this Court depends are:

(a) Plaintiff is a corporation incorporated under the laws of the State of Delaware and is a citizen of that State, and all of the defendants are citizens either of the State of Nevada or the State of Arizona.

(b) The action arises under the laws of the United States, i.e., 43 U.S.C.A., §617 through 617v and 43 U.S.C.A., §618 through 618o, as hereinafter more fully appears.

(c) The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

III.

At all times mentioned herein plaintiff was and is now a public service corporation engaged in the business of owning and operating, among other

things, an electric utility system serving consumers in Mohave County, Arizona, with electrical energy for domestic, industrial and commercial purposes. Plaintiff also owns and operates an electric utility system at and about Nogales, Santa Cruz County, Arizona.

IV.

Under date of January 7, 1938, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and Acts amendatory thereof or supplementary thereto, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the "Boulder Canyon Project Act," the United States of America, acting through the Secretary of the Interior, entered into a contract with plaintiff. On or about the 2nd day of December, 1941, pursuant to the Acts of Congress hereinabove mentioned and further pursuant to the Act of Congress approved July 19, 1940 (54 Stat. 774), designated the "Boulder Canyon Project Adjustment Act," the United States of America, acting through the Secretary of the Interior, entered into a contract with plaintiff in substitution for the contract entered into between said parties on the 7th day of January, 1938.

V.

Under the provisions of said contracts of January 7, 1938 and of December 2, 1941, the United States of America agreed, among other things, to cause to be delivered to plaintiff at and from the Arizona Wing of Hoover Dam Power Plant for the

period beginning October 20, 1938, and ending on and including December 31, 1954, so much firm electrical energy as would be required by plaintiff for distribution to its customers, not however exceeding 50,000,000 kwh annually at rates specified to be measured by provisions of the contract. Over the period of time during which the contract has been in force the average cost per kwh to plaintiff for this energy has been approximately $2\frac{1}{4}$ mills per kwh. Under the provisions of said contract the electrical energy to be delivered by the United States of America to plaintiff thereunder was to be generated by means of generators situated in the Arizona Wing of the Hoover Dam Power Plant.

VI.

Since October, 1938, substantially all electrical energy distributed by plaintiff to its consumers through its aforesaid Mohave County electrical system has been generated at the Hoover Dam Power Plant aforesaid and purchased by plaintiff from the United States of America pursuant to the aforesaid contracts. Plaintiff's purchases of said electrical energy have approximated from 19,000,000 to 24,000,000 kwh annually. In the foreseeable future plaintiff's demand for electrical energy for use in Mohave County will be as great or will exceed that in the past.

VII.

Section 5 of said Boulder Canyon Project Act (43 U.S.C.A. §617d) reads in part as follows:

“Renewal of contracts for electrical energy.
The holder of any contract for electrical

energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.”

Plaintiff, as the holder of a contract referred to in §617d hereinabove is among that class of persons upon whom rights of renewal were conferred thereby. To the date of this Complaint the Secretary of the Interior has not manifested any intention of election to purchase or acquire Plaintiff's facilities as provided in §617d.

VIII.

In or about the year 1952 plaintiff, pursuant to the provisions of §617d of the Boulder Canyon Project Act aforesaid duly made application to the Secretary of Interior for the renewal of its contract dated December 2, 1941. In response to said request the Secretary of Interior, by letter to plaintiff dated on or about March 2, 1954 (a copy of which is attached hereto, marked Exhibit “A” and by reference made a part hereof), offered to renew said contract. On or about the 16th day of March, 1954, plaintiff accepted said offer of renewal by letter, copy of which is attached hereto, marked Exhibit “B” and by reference made a part hereof.

IX.

Prior to March, 1954, plaintiff, in order to protect its consumers in Mohave County, Arizona, from a failure or shortage of electrical energy in the event that the Secretary of the Interior made the alternative election to purchase or acquire plaintiff's facilities as provided for in §617d of the Boulder Canyon Project Act, contracted with the Arizona Power Authority to purchase from it for delivery to plaintiff in Mohave County, 18,400,000 kwh of electrical energy annually commencing January 1, 1955. Subsequent to the acts of the Secretary of March, 1954, and in reliance thereupon, and in view of the lack of any further need for a reserve supply of energy for Mohave County, plaintiff made arrangements with the Arizona Power Authority for the transfer of its said block of 18,400,000 kwh of electrical energy to its electric distribution system in and about Nogales, Santa Cruz County, Arizona. In connection with said arrangement and in implementation thereof, plaintiff undertook the construction of an electrical transmission line from the vicinity of Tucson, Arizona, to Nogales, Arizona, at an estimated cost of \$873,000.00 for the purpose of transmitting the said Arizona Power Authority block of energy to Nogales and distributing it to plaintiff's customers in that area. In further reliance upon the acts of the Secretary of March, 1954, plaintiff abandoned its plans for increasing the generating capacity of its Nogales electrical plant to meet the increasing demands of its customers in that area. To date plain-

tiff has expended in the construction of the aforesaid Tucson to Nogales transmission line, approximately \$275,000.00 and stands committed for the expenditure of approximately \$75,000.00 in excess thereof.

X.

To the date of this complaint and despite repeated requests by plaintiff, the Secretary of the Interior has unlawfully and improperly failed and refused to perform the purely ministerial act of executing and delivering to plaintiff the formal written contract of renewal, as required by §617d of the Boulder Canyon Project Act and the determination of the Secretary of March, 1954. Plaintiff is informed and believes that the said renewal will not be given by the Secretary of the Interior to plaintiff. To the contrary, plaintiff is informed and believes that the Secretary of the Interior has announced his intention, and has threatened, to terminate the supply of electrical energy to plaintiff from Hoover Dam as of the date of the expiration of the 1941 contract, i.e., midnight, December 31, 1954. The omissions and the threats hereinabove described are arbitrary and capricious, conceived and executed in bad faith and are beyond the authority in law of the Secretary of the Interior. Plaintiff is informed and believes that the Secretary of the Interior has given, or will shortly give, instructions to defendant Nielson and defendants John Doe I through 9, to effect a discontinuance of the delivery of Hoover Dam energy to plaintiff as of midnight, December 31, 1954. Plaintiff is further

informed and believes that the said defendants, unless restrained by this complaint, will carry out the said unlawful instructions of the Secretary.

XI.

If defendants are permitted to discontinue the distribution of Hoover Dam electrical energy to plaintiff as threatened, plaintiff will suffer irreparable injury which cannot adequately be redressed by an action at law, for the reasons:

(a) Plaintiff has no facilities or commitments which assure plaintiff a supply of electrical energy for delivery to its consumers in Mohave County after December 31, 1954.

(b) If plaintiff is able to purchase electrical energy for delivery to its Mohave County consumers subsequent to December 31, 1954, it will be conditioned upon plaintiff making long-term commitments for such energy which will render ineffective any ultimate relief which might be granted herein, and in any event, the cost of such energy will be more than double the cost of energy purchased under the 1941 contract aforesaid.

(c) The uncertainty which will result from plaintiff's lack of a firm and economical supply of electrical energy will result in a loss of consumer demand and resulting damage to plaintiff which will be impossible to accurately measure in an action at law.

(d) Plaintiff will be compelled to institute and prosecute multiple and successive actions at law for the recovery of its damages.

XII.

Plaintiff has no adequate remedy at law. No previous application for this or any similar relief has been made to any other Court or judge.

Wherefore, plaintiff prays as follows:

1. That a temporary restraining order be issued forthwith and without notice to the defendants, enjoining, restraining and prohibiting the defendants, and each of them, their officers, agents, servants, employees, attorneys and all other persons in active concert or participation with them, and all persons having actual notice of said restraining order, from doing or failing to do any act or thing which will cause or result in an interference with or disruption, termination or cessation of the delivery of Hoover Dam electrical energy to plaintiff in the manner of and under the conditions now governing the delivery of such energy to plaintiff.

2. That in conjunction with the granting of the aforesaid temporary restraining order, an order to show cause be issued directing the defendants to show cause within the time fixed by law why a preliminary injunction should not issue enjoining and restraining the defendants and others as aforesaid.

3. That upon due notice and final hearing a writ of permanent injunction be issued enjoining, restraining and prohibiting defendants and others as aforesaid.

4. That plaintiff have such other and further relief as to this Honorable Court may seem meet

and equitable in the premises and that the plaintiff have and recover his costs herein expended.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ J. S. JENCKES, JR.,
Attorneys for Plaintiff.

Duly verified.

EXHIBIT A

United States Department of the Interior, Office
of the Secretary, Washington 25, D. C.

Mar. 2, 1954.

My Dear Mr. Gould:

Recently there has been an interchange of correspondence between this office and the City of Los Angeles, the Southern California Edison Company, and the California Electric Power Company, pertaining to an extension of the term of contract of the California-Pacific Utilities Company for power and energy from the Hoover Dam Powerplant of the Boulder Canyon Project. A copy of our joint letter to the above three allottees, together with a copy of the Memorandum from the Office of The Solicitor, is enclosed for your information. You will note that we are instructing the Commissioner of Reclamation to extend the term of contract of the California-Pacific Utilities Company as indicated in the joint letter.

If you are interested in extending your contract for Hoover Dam power and energy, it is suggested that you confer with the Regional Director of the Bureau of Reclamation at Boulder City, Nevada.

Sincerely yours,

/s/ DOUGLAS McKAY,

Secretary of the Interior.

Mr. Milton S. Gould,
Citizens Utilities Company,
Greenwich, Connecticut.

Enclosures 2.

United States Department of the Interior, Office
of the Secretary, Washington, D. C.

Mar. 2, 1954

Gentlemen:

Your letters of January 18, January 29, and January 20, 1954, respectively, pertaining to the future supply of Boulder Canyon Project power and energy from the Hoover Dam to the California-Pacific Utilities Company, have been received.

Subsequent to the receipt of your letters, this matter was referred to the Office of The Solicitor, Department of the Interior. There is enclosed for your information a copy of a Memorandum, dated February 18, 1954, prepared by Mr. William J. Burke, Special Assistant to the Solicitor.

In accordance with the Memorandum of the Office

of The Solicitor, we are instructing the Commissioner of Reclamation to offer to extend the contract of the California-Pacific Utilities Company for such term as the Company may desire, up to midnight of May 31, 1987, with a provision that the power and energy may be withdrawn in whole or in part by the Metropolitan Water District of Southern California only upon a showing by the District of its needs for such power and energy. The Commissioner of Reclamation is also being instructed to offer a similar extension of contract to the Citizens Utilities Company.

We are sending copies of this letter to the Metropolitan Water District of Southern California, Colorado River Commission of Nevada, Arizona Power Authority, California-Pacific Utilities Company, and Citizens Utilities Company.

Sincerely yours,

/s/ DOUGLAS McKAY,

Secretary of the Interior.

The City of Los Angeles,
Department of Water and Power,
Los Angeles 54, California.

Southern California Edison Company,
Edison Building,
Los Angeles 53, California.

California Electric Power Company,
Riverside, California.

Enclosure

- Copy to:
1. Metropolitan Water District of Southern California.
 2. Colorado River Commission of Nevada.
 3. Arizona Power Authority.
 4. California-Pacific Utilities Company.
 5. Citizens Utilities Company.
 6. Regional Director, Boulder City, Nev.
 7. Regional Counsel, Los Angeles, Calif.

(All with copy of Memorandum of Solicitor of 2/18/54.)

(Copy)

United States Department of the Interior, Office
of the Solicitor, Washington 25, D. C.

February 18, 1954.

Memorandum

To: Under Secretary Tudor,
From: William J. Burke,
Subject: California-Pacific Utilities Company.

The extant contract with the Metropolitan Water District of Southern California is that of May 29, 1941. This contract is in excess of the District's needs for firm energy. The United States can sell the unused District firm energy. The contract of November 21, 1941, with the California-Pacific Utilities Company is for a purchase of the District's unused firm energy. The subject-matter energy of the contract of May 31, 1945, with the City of Los Angeles, the Southern California Edi-

son Company, Ltd., and the California Electric Power Company is defined in the sixth Whereas clause as all Boulder firm energy unused by the District for pumping water "and unused by the resale consumers under contracts referred to in Article 5 hereof." The California-Pacific Utilities Company is one of such "resale consumers" to the extent of 20,000,000 kwh.

Thus, the conclusion is compelled that the 20,000,000 kwh unused District energy as of December 31, 1954, contracted for by the California-Pacific Utilities Company under its November 21, 1941 contract is excluded from the "unused energy" contracted for by the City of Los Angeles, Edison Company, and California Electric under the May 31, 1945, contract. Such unused District energy is available for sale by the United States without obtaining the consent of the City of Los Angeles, Edison Company, and California Electric. I recommend that letters, accordingly, be sent to Kine, Ernst, Davenport and Morris.

/s/ WILLIAM J. BURKE,
Special Assistant to the
Solicitor.

EXHIBIT B

(Copy)

Citizens Utilities Company

March 16, 1954.

Kingman, Arizona.

E. G. Nielson, Regional Director,
U. S. Bureau of Reclamation,
Boulder City, Nevada.

Dear Mr. Nielson:

We wish to confirm our visit to Boulder City in reference to the letter of March 2, 1954, addressed to Mr. Milton S. Gould.

Please be advised that in accordance with the memorandum from the office of the Solicitor, dated February 18, 1954, and the letters of the Secretary of the Interior, we accept the offer to extend up to midnight of May 31, 1987, the existing contract for the supply of power and energy from Hoover Dam.

Yours very truly,

JOHN C. GIBBS,
Vice President.

JCG:mlh

cc: Milton S. Gould,

Douglas McKay, Secretary of the Interior.

[Endorsed]: Filed December 24, 1954.

In the United States District Court,
for the District of Arizona

Civ. No. 427 Pret.

CITIZENS UTILITIES COMPANY, a Corpora-
tion,

Plaintiff,

vs.

E. G. NIELSON, JOHN DOE 1, JOHN DOE 2,
JOHN DOE 3, JOHN DOE 4, JOHN DOE 5,
JOHN DOE 6, JOHN DOE 7, JOHN DOE 8,
and JOHN DOE 9,

Defendants.

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

Whereas, in the above-entitled cause a verified Complaint has been filed, and it appearing from the specific facts set forth in said Complaint that immediate and irreparable injury, loss or damage will be caused to the plaintiff, his property and property rights, unless the above-named defendants are, pending a hearing for a preliminary injunction, restrained and enjoined as herein set forth, and it further appearing that plaintiff has no plain, speedy or adequate remedy at law, all for the reasons:

1. That plaintiff is now engaged as a public service corporation, owning and operating an electrical distribution system in Mohave County, Arizona, and has for some time past, and presently, re-

ceived energy for distribution to its customers from the Bureau of Reclamation, Department of the Interior, at Hoover Dam, and

2. That plaintiff claims a right to renewal and the existence of a renewal of its contract for the delivery of electrical energy to it by the Bureau of Reclamation, Department of Interior, at Hoover Dam, and

3. That the Secretary of the Interior has offered to renew and has in fact renewed the contract between plaintiff and the Secretary of the Interior for the sale of such energy by the Secretary to plaintiff for a period terminating on May 31, 1987, and

4. That the Secretary of the Interior has failed to execute and deliver to plaintiff a written contract representing such renewal and has, to the contrary, announced his intention not to deliver such formal written contract of renewal and to terminate plaintiff's supply of energy from Hoover Dam as of midnight, December 31, 1954, and

5. That defendants, and each of them, are responsible for and supervise the generation and distribution of electrical energy at Hoover Dam and have threatened and made known to plaintiff their instructions to terminate plaintiff's supply of Hoover Dam energy as of midnight, December 31, 1954, and

6. That plaintiff has no facilities or commitments which assure plaintiff a supply of electrical

energy for delivery to its consumers in Mohave County after December 31, 1954, and

7. That if plaintiff is able to purchase electrical energy for delivery to its Mohave County consumers subsequent to December 31, 1954, it will be conditioned upon plaintiff making long-term commitments for such energy which will render ineffective any relief which might be granted herein, and, in any event, the cost of such energy will be more than double the cost of energy purchased under said 1941 contract, and

8. That the uncertainty which will result from plaintiff's lack of a firm and economical supply of electrical energy will result in diminished consumer demand and consequent damage to plaintiff which will be impossible to accurately measure in an action at law, and

9. That plaintiff will be compelled to institute and prosecute multiple and successive actions at law for the recovery of its damages, and

Whereas, it further appears that the expiration of the time necessary in giving the defendants reasonable notice would result in the irreparable loss and damage to plaintiff which is sought to be prevented or mitigated by this Order,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that, conditioned upon plaintiff giving bond in the sum of \$1,000 as required by the provisions of Rule 65, Federal Rules of Civil Procedure, to be approved by the Clerk, the defendants

and each of them, their agents, servants, employees, attorneys and all other persons in active concert or participation with them, and all persons having actual notice of this Order, be and they hereby are enjoined and restrained from doing or failing to do any act or thing which will cause or result in an interference with or disruption, termination or cessation of the delivery of Hoover Dam electrical energy to plaintiff in the manner or under the conditions now covering the delivery of such energy to plaintiff.

It Is Further Ordered that this Order shall expire upon the date hereinafter mentioned unless within said time it is for good cause shown extended for a longer period, or unless defendants consent that it may be extended for a longer period.

It Is Further Ordered, Adjudged and Decreed that the defendants and each of them show cause before this Court, if any they have, in the Federal District Court hereof at the Federal Court House at Phoenix, Arizona, on the 3rd day of January, 1955, at the hour of 2:00 o'clock p.m., why defendants and each of them, their officers, agents, servants, employees, attorneys and all other persons in active concert or participation with them, shall not be enjoined and restrained in accordance with the terms of this restraining order for the pendency of this action.

It Is Further Ordered, Adjudged and Decreed that copies of this temporary restraining order be personally served upon the defendants forthwith.

Issued in Open Court this 24th day of December, 1954, at the hour of 11:45 o'clock a.m.

/s/ DAVE W. LING,

United States District Judge.

[Endorsed]: Filed December 24, 1954.

[Title of District Court and Cause.]

BOND FOR TEMPORARY RESTRAINING ORDER

Know All Men by These Presents that we, Citizens Utilities Company, as principal, and Hartford Accident & Indemnity Company, as surety, are held and firmly bound unto E. G. Nielson, John Doe 1, John Doe 2, John Doe 3, John Doe 4, John Doe 5, John Doe 6, John Doe 7, John Doe 8, and John Doe 9, defendants in the above-entitled action in the sum of One Thousand Dollars (\$1,000.00) to be paid to said defendants, their heirs, executors, administrators and assigns, to the payment of which we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of December, 1954.

The condition of the above obligation is such that whereas Citizens Utilities Company, plaintiff in the above-entitled cause, has obtained from the United States District Court for the District of Arizona, a Temporary Restraining Order against defendants, upon condition that plaintiff shall execute and file a

good and sufficient bond for the sum of \$1,000.00, to secure the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

Now, if the above bounded Citizens Utilities Company and Hartford Accident & Indemnity Company shall well and truly pay all such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained by reason of said Temporary Restraining Order should it be thereafter dissolved or it be decided that said Temporary Restraining Order was wrongfully obtained, then this obligation to be void, otherwise it shall remain in full force and virtue.

CITIZENS UTILITIES
COMPANY,

By /s/ J. S. JENCKES, JR.,
Its Atty., Principal.

[Seal] HARTFORD ACCIDENT &
INDEMNITY COMPANY,

By /s/ V. M. HALDIMAN,
Surety.

Above bond approved this 24th day of December,
1954.

/s/ WM. H. LOVELESS,
Clerk of District Court.

[Endorsed]: Filed December 24, 1954.

[Title of District Court and Cause.]

MINUTE ENTRY OF FRIDAY,
DECEMBER 31, 1954

Honorable Dave W. Ling, United States District
Judge, Presiding.

Joseph S. Jenckes, Jr., Esquire, and Earl Carroll, Esquire, appear for the plaintiff. Everett Gordon, Esquire, Assistant United States Attorney, appears on behalf of the defendants.

It Is Ordered that the return day on Order to Show Cause, heretofore entered, is continued until Monday, January 17, 1955, at 3:00 o'clock p.m., at Tucson, Arizona, and that the Temporary Restraining Order herein remain in force until said time.

It Is Further Ordered that Plaintiff's bond on temporary restraining order be increased to the sum of \$10,000.00, said bond to be approved by the Clerk.

[Title of District Court and Cause.]

BOND FOR TEMPORARY RESTRAINING
ORDER

Know All Men by These Presents that we, Citizens Utilities Company, as principal, and Hartford Accident & Indemnity Company, as surety, are held and firmly bound unto E. G. Nielson, John Doe 1, John Doe 2, John Doe 3, John Doe 4, John Doe 5, John Doe 6, John Doe 7, John Doe 8, and John Doe 9, defendants in the above-entitled action, in the sum of Ten Thousand and No/100 Dollars (\$10,000.00)

to be paid to said defendants, their heirs, executors, administrators and assigns, to the payment of which we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of December, 1954.

The condition of the above obligation is such that whereas Citizens Utilities Company, plaintiff in the above-entitled cause, has obtained from the United States District Court for the District of Arizona, a Temporary Restraining Order against defendants, upon condition that plaintiff shall execute and file a good and sufficient bond for the sum of \$10,000.00, to secure the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

Now, if the above-bounded Citizens Utilities Company and Hartford Accident & Indemnity Company shall well and truly pay all such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained by reason of said Temporary Restraining Order should it be thereafter dissolved or it be decided that said Temporary Restraining Order was wrongfully obtained, then this obligation to be void, otherwise it shall remain in full force and virtue.

CITIZENS UTILITIES
COMPANY,

By /s/ J. S. JENCKES, JR.,
Its Attorney, Principal.

[Seal] HARTFORD ACCIDENT &
INDEMNITY COMPANY,

By /s/ V. M. HALDIMAN,

V. M. Haldiman, Attorney-in-
Fact, Surety.

Above bond approved this 3rd day of January,
1955.

/s/ WM. H. LOVELESS,
Clerk of District Court.

[Endorsed]: Filed January 3, 1955.

[Title of District Court and Cause.]

SUMMONS

To the above named Defendants: E. G. Nielson, John Doe 1, John Doe 2, John Doe 3, John Doe 4, John Doe 5, John Doe 6, John Doe 7, John Doe 8, and John Doe 9. You are hereby summoned and required to serve upon Evans, Hull, Kitchel & Jenckes, plaintiff's attorneys, whose address is 807 Title & Trust Bldg., Phoenix, Arizona, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal] WM. H. LOVELESS,
Clerk of Court;

/s/ DOROTHY J. KENNEDY,
Deputy Clerk.

Date: Dec. 27, 1954.

Note—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Return on Service of Writ

United States of America,
District of Arizona—ss.

I hereby certify and return that I served the annexed Summons and Temporary Restraining Order and Order to Show Cause on the therein-named (John Doe 1) Aloysius L. Kunkel and (John Doe 2) Howard Schriber in their office in the Boulder Dam at 3:00 p.m. and on Albert E. Hamilton in his office at Boulder City, Nev., at 4:00 p.m. and on Lloyd J. Hudlow in his office at Boulder City, Nev., at 4:40 p.m. and on Fredrick C. Keller at his place of residence at Davis City, Ariz., at 7:20 p.m. by showing each of them the original Summons at the time and place specified and by handing to and leaving a true and correct copy thereof with each of them personally at time and place specified in said District on the 29th day of December, 1954.

ARCHIE M. MEYER,

U. S. Marshal;

By /s/ ARLEIGH T. HARTLEY,
Deputy.

Travel	\$20.10
Service	\$20.00

\$40.10

Return on Service of Writ

United States of America,
District of Arizona—ss.

I hereby certify and return that I served the annexed Summons on the therein-named E. A. Benson

(who states true name to be Erick A. Benson) by handing to and leaving a true and correct copy thereof with attached Complaint to him personally at 6:15 W. 43rd Ave., Phoenix, Arizona, in the said District at 3:15 p.m., on the 28th day of December, 1954.

ARCHIE M. MEYER,

United States Marshal;

By /s/ MARVIN C. MORRISETT,
Deputy.

Marshal's fees \$2.00

Mileage 1.10

Return on Service of Writ

United States of America,

District of Arizona—ss.

I hereby certify and return that I served the annexed Temporary Restraining Order and Order to Show Cause on the therein-named E. A. Benson (who states true name to be Erick A. Benson) by handing to and leaving a true and correct copy thereof with him personally at 6:15 So. 43rd Ave. at Phoenix, Arizona, in the said District at 3:15 p.m., on the 28th day of December, 1954.

ARCHIE M. MEYER,

United States Marshal;

By /s/ MARVIN C. MORRISETT,
Deputy.

Marshal's fees \$2.00

Mileage none

[Endorsed]: Filed January 4, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendants Aloysius L. Kunkel and Howard C. Schriber, and each of them separately, moves the court as follows:

1. To dismiss the action on the ground that the action is in essence an action against the United States, and the United States has not consented to be sued.

2. To dismiss the action because of the absence of an indispensable party defendant, to wit: Douglas McKay, Secretary of the Interior of the United States of America.

3. To dismiss the action on the grounds that neither the defendant Kunkel nor the defendant Schriber is a proper party.

4. To dismiss the action on the ground that it has been filed in the wrong District, because the action set forth in the complaint is not founded solely on diversity of citizenship.

5. To dismiss the action on the ground that the plaintiff has a complete and adequate remedy at law.

ROGER ARNEBERGH,

City Attorney of the City of
Los Angeles;

GILMORE TILLMAN,

Chief Assistant, City Attorney
for Water and Power;

JOHN H. MATHEWS,

Deputy City Attorney;

DARRELL P. McCRORY,
Deputy City Attorney;

By /s/JOHN H. MATTHEWS,
Attorneys for Defendants Aloysius L. Kunkel and
Howard C. Schriber.

Notice of Motion

To Messrs. Evans, Hull, Kitchel and Jenckes, Attorneys for Plaintiff:

Please Take Notice that the undersigned will bring the above motion on for hearing before this Court in the Court Room of the United States District Court, Tucson, Arizona, on the 17th day of January, 1955, at 3:00 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard.

ROGER ARNEBERGH,
City Attorney of the City of
Los Angeles;

GILMORE TILLMAN,
Chief Assistant, City Attorney
for Water and Power;

JOHN H. MATTHEWS,
Deputy City Attorney;

DARRELL P. McCRORY,
Deputy City Attorney;

By /s/ JOHN H. MATTHEWS,
Attorneys for Defendants Aloysius L. Kunkel and
Howard C. Schriber.

[Title of District Court and Cause.]

AFFIDAVIT OF ALOYSIUS L. KUNKEL

State of Nevada,
County of Clark—ss.

Aloysius L. Kunkel, being first duly sworn, deposes and says, that he is one of the parties sued as defendant in the above-entitled action, he having been named therein as John Doe 2; that he is an employee of the Department of Water and Power of the City of Los Angeles, a Municipal Corporation, of the State of California; that as such employee he has the title of Chief Electric Power Plant Operator for the City of Los Angeles at Hoover Dam Power Plant; that his duties are to supervise and direct a group of operators at the plant, which group, in three shifts during each day, operate the generating facilities and the transforming and switching equipment at Hoover Dam Power Plant assigned to the City of Los Angeles under the provisions of that certain agreement dated May 29, 1941, between the United States, the City of Los Angeles and its Department of Water and Power and Southern California Edison Company, said agreement being commonly known as the Agency Contract; that as such employee he is not under the direct supervision or control of the Regional Director, Region III, Boulder City, Nevada, or of any other employee or officer of the United States; that his immediate supervisors in connection with his duties are employees of the Department of Water and Power of the City of Los Angeles, to wit, the Superintendent for the City of

Los Angeles at Hoover Dam Power Plant and the Assistant Superintendent; that he is subject to the supervision and directions of such Superintendent and Assistant Superintendent and their superiors in the Department of Water and Power of the City of Los Angeles and of no other person or persons whatsoever.

/s/ ALOYSIUS L. KUNKEL,

Subscribed and Sworn to Before Me This 10th Day of January, 1955.

[Seal] /s/ LILLIAN M. WESTEN,

Notary Public in and for Said
County and State.

My Commision Expires November 3, 1957.

[Title of District Court and Cause.]

AFFIDAVIT OF HOWARD SHRIBER

State of Nevada,
County of Clark—ss.

Howard Shriber, being first duly sworn, deposes and says, that he is one of the parties sued as defendant in the above-entitled action, he having been sued therein as John Doe 3; that he is an employee of the Department of Water and Power of the City of Los Angeles, a Municipal Corporation of the State of California; that as such employee he has the title of shift foreman and as such his duties are to supervise and direct a group or shift of operators, which group during its shift, operates the generating facilities and the transforming and switching equipment at Hoover Dam Power Plant

assigned to the City of Los Angeles under the provisions of that certain agreement dated May 29, 1941, between the United States, the City of Los Angeles and its Department of Water and Power, and Southern California Edison Company, commonly known as the Agency Contract; that as such employee he is not under the direct supervision or control of the Regional Director, Region III, Boulder City, Nevada, or any other employee or officer of the United States; that his immediate superiors in connection with his employment are employees of the Department of Water and Power of the City of Los Angeles, to wit, the chief Electric Plant Operator, the Superintendent for the City of Los Angeles at Hoover Dam Power Plant, and the Assistant Superintendent; that he is subject to the supervision and direction of such Chief Electric Plant Operator, the said Superintendent and the said Assistant Superintendent and their superiors in the Department of Water and Power of the City of Los Angeles, and of no other person or persons whatsoever.

/s/ HOWARD SHRIBER.

Subscribed and Sworn to Before Me This 10th Day of January, 1955.

[Seal] /s/ LILLIAN M. WESTEN,

Notary Public in and for Said
County and State.

My Commission Expires November 3, 1957.

[Endorsed]: Filed January 11, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS AND TO QUASH
SERVICE

Now Come the defendants, E. G. Nielson, Regional Director of the Bureau of Reclamation, Region No. III, United States Department of the Interior, and Lloyd G. Hudlow, Project Engineer, United States Bureau of Reclamation, Region No. III, United States Department of the Interior, by Jack D. H. Hays, United States Attorney for the District of Arizona, and Everett L. Gordon, Assistant United States Attorney for said District, and moves the Court as follows:

1. To quash the service had on these defendants because of lack of jurisdiction over the person.

2. To dismiss the above-entitled action because of improper venue.

3. To dismiss the above-entitled action because it is in effect an action against the United States of America, and the United States of America has not waived its sovereign immunity.

4. To dismiss the above-entitled action because Douglas McKay as Secretary of the Interior of the United States of America is an indispensable party defendant.

5. To dismiss the above-entitled action for the reason that plaintiff has a complete and adequate remedy at law.

6. To vacate the Temporary Restraining Order

and Order to Show Cause and dismiss the above-entitled action because it is against an officer or agency of the United States of America, and service was not had as required by Rule 4(d)(5) of the Federal Rules of Civil Procedure of the United States District Courts.

JACK D. H. HAYS,
United States Attorney for
the District of Arizona.

/s/ EVERETT L. GORDON,
Assistant United States
Attorney.

[Endorsed]: Filed January 11, 1955.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY,
JANUARY 17, 1955
(Prescott Division)

Honorable James A. Walsh, United States District
Judge, Presiding

Joseph S. Jenckes, Jr., Esquire, and Earl Carroll, Esquire, appear as counsel for the plaintiff. Everett Gordon, Esquire, Assistant United States Attorney, appears as counsel for the defendants E. G. Nielson, Lloyd G. Hudlow, E. A. Benson and Frederick C. Keller.

On motion of said Assistant United States Attorney,

It Is Ordered that Darrel B. McCrory, Esquire, is admitted specially to practice in this case.

On motion of Milton Cole, Esquire,

It Is Ordered that John H. Mathews, Esquire, is admitted specially to practice in this case.

Subsequently, Darrel B. McCrory, Esquire, and John H. Mathews, Esquire, appear on behalf of the defendants Aloysius L. Kunkel, Howard C. Schriber and Albert E. Hamilton.

The Motion to Dismiss of the defendants Aloysius L. Kunkel and Howard Schriber; the Motion to Dismiss or to Quash Service of the defendant Albert E. Hamilton; the Motion to Dismiss and to Vacate Temporary Restraining Order of the defendant E. A. Benson; and the Motions to Quash Service and to Dismiss of the Defendant E. G. Nielson come on regularly for hearing this day.

Said Motions are now duly argued by respective counsel, and

It Is Ordered that said Motions are submitted and by the Court taken under advisement, ruling on said Motions being reserved to Wednesday, January 19, 1955, at 2:00 o'clock p.m.

On stipulation of counsel,

It Is Ordered that this case is dismissed as to the defendants E. A. Benson and Frederick C. Keller.

[Title of District Court and Cause.]

MINUTE ENTRY OF WEDNESDAY,
JANUARY 19, 1955

Honorable James A. Walsh, United States District
Judge, Presiding

Joseph S. Jenckes, Jr., Esquire, is present for the plaintiff. John H. Mathews, Esquire, and Daniel McCrory, Esquire, are present for the defendants Aloysius L. Kunkel, Howard C. Schriber and Albert E. Hamilton. Everett Gordon, Esquire, Assistant United States Attorney, is present for the defendants E. G. Nielson and Lloyd G. Hudlow.

The Motion to Dismiss of the defendants Aloysius L. Kunkel and Howard Schriber; the Motion to Dismiss or to Quash Service of the defendant Albert E. Hamilton; the Motion to Dismiss and to Vacate Temporary Restraining Order of the defendant E. A. Benson, and the Motion to Quash Service and to Dismiss of the defendant E. G. Nielson having been argued, submitted and by the Court taken under advisement, and the Court having duly considered the same, and being fully advised in the premises,

It Is Ordered that the motions of the defendants E. G. Nielson, Lloyd G. Hudlow and Albert E. Hamilton to quash purported service of process are granted.

It Is Ordered that defendants' Motions to Dis-

miss are granted on the grounds that this is in reality a suit against the United States, and

It Is Ordered that defendants' Motions to Dismiss are granted on the grounds that the Secretary of the Interior is an indispensable party to this action.

[Title of District Court and Cause.]

MINUTE ENTRY OF FRIDAY,
JANUARY 21, 1955

Honorable James A. Walsh, United States District
Judge, Presiding

It Is Ordered that the complaint of the plaintiff be and the same hereby is dismissed upon the grounds and for the reasons that (1) the suit is in reality a suit against the United States which has not consented to be sued; and (2) the Secretary of the Interior is an indispensable party in the action.

It Is Further Ordered that the restraining order issued herein on December 24, 1954, be and the same hereby is quashed.

[Title of District Court and Cause.]

MOTION FOR RESTORATION AND CON-
TINUANCE OF RESTRAINING ORDER
PENDING APPEAL

Comes now the plaintiff and moves the Court for an Order restoring and continuing in effect the Restraining Order heretofore entered herein on De-

cember 24, 1954, pending the appeal to the United States Court of Appeals for the Ninth Circuit from the judgment of this Court entered on the 21st day of January, 1955, dismissing plaintiff's Complaint and quashing the aforesaid Restraining Order, Notice of Appeal therefrom having been filed by plaintiff on the 24th day of January, 1955, and for grounds of this Motion defendants refer to the allegations of plaintiff's Complaint herein disclosing that plaintiff will suffer irreparable injury unless said Restraining Order is restored and continued in effect pending said appeal. In making this Motion plaintiff consents and agrees that the Court may condition the restoration and continuance of said Restraining Order upon plaintiff's giving security in such sum as the Court deems proper for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained or which may be suffered by any other person, firm, corporation or political entity as a result of wrongful restraint.

Dated this 24th day of January, 1955.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ J. S. JENCKES, JR.,

Service of Copy acknowledged.

[Endorsed]: Filed January 24, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that plaintiff above named hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 21st day of January, 1955, dismissing plaintiff's Complaint and quashing the Restraining Order issued herein on December 24, 1954.

Dated this 24th day of January, 1955.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ J. S. JENCKES, JR.,
Attorneys for Appellant.

Service of Copy acknowledged.

[Endorsed]: Filed January 24, 1955.

[Title of District Court and Cause.]

COST BOND

Know All Men by These Presents, That we, Citizens Utilities Company, as Principal and Hartford Accident & Indemnity Company, as Surety, are held and firmly bound unto the defendants, E. G. Nielson, Lloyd G. Hudlow, Aloysius L. Kunkel and Howard C. Schriber in the sum of Two Hundred Fifty Dollars (\$250.00) to be paid to said defendants, their

successors and assigns, to which payment we bind ourselves, our successors and assigns, jointly and severally.

Whereas, on the 21st day of January, 1955, a judgment was entered in the above-entitled action against the plaintiff therein, and the said plaintiff has duly filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit,

Now, Therefore, the condition of this Bond is that if the said plaintiff shall pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Court of Appeals may award if the judgment is modified, then the above obligation to be void, otherwise to remain in full force and effect.

CITIZENS UTILITIES
COMPANY,

By /s/ J. S. JENCKES, JR.,
Its Attorney, Principal.

[Seal] HARTFORD ACCIDENT &
INDEMNITY COMPANY

By /s/ JOHN B. HALDIMAN,
Attorney-in-Fact, Surety.

State of Arizona,
County of Maricopa—ss.

This instrument was acknowledged before me this 24th day of January, 1955, by Jos. S. Jenckes, Jr., as attorney for Citizens Utilities Company.

[Seal] /s/ ALICE J. FITCH,
Notary Public.

My commission expires March 4, 1956.

State of Arizona,
County of Maricopa—ss.

On this, the 24th day of January, 1955, before me, Mary Henneberry, the undersigned officer, personally appeared John B. Haldiman, known to me (or satisfactorily proven) to be the person whose name is subscribed as attorney-in-fact for Hartford Accident & Indemnity Company, and acknowledged that he executed the same as the act of his principal for the purposes therein contained.

In Witness Whereof, I hereunto set my hand and official seal.

[Seal] /s/ MARY HENNEBERRY,
Notary Public.

My commission expires June 30, 1956.

[Endorsed]: Filed January 24, 1955.

[Title of District Court and Cause.]

AFFIDAVIT

State of Arizona,
County of Maricopa—ss.

E. A. Benson, being first duly sworn, deposes and says, that he is the Project Manager of the Parker-Davis Project, Bureau of Reclamation, United States Department of the Interior; that as such Project Manager he is in charge of construction, operation, maintenance, management and administration of the Davis Dam and Parker Dam Power

Plants, including transmission line facilities connected therewith and relating thereto; that at 12:01 a.m. on the 22nd day of January, 1955, pursuant to the request of the Arizona Power Authority electric energy in a total maximum amount of 6,000 kilowatts at a voltage of 69,000 volts was delivered and is being presently delivered at the point of interconnection between the Davis-Kingman 69,000 volt tap line of the Bureau of Reclamation and the Hoover-Kingman 69,000 volt line of the Citizens Utilities Company and at a second point of delivery at the Bullhead City Substation in the vicinity of Davis Dam, which Substation is owned by the Mohave Electric Cooperative, a customer of the Citizens Utilities Company; that delivery of electric energy generated at Hoover Dam which was delivered to Citizens was terminated at 12:01 a.m. on the 22nd day of January, 1955; that your affiant is informed and believes that Citizens Utilities Company entered into temporary arrangements with the Arizona Power Authority for an "emergency" power supply until February 12, 1955, and that Arizona Power Authority is willing to negotiate with Citizens Utilities Company and, if and when requested by it, to attempt to secure delivery of a firm supply of electric energy in substitution of electric energy theretofore delivered to Citizens Utilities Company by the United States; and further your affiant is informed and believes that Citizens Utilities Company has fixed a time and place for commencement of negotiations with the Arizona Power Authority for delivery of such firm

energy. Finally, your affiant states that in his opinion and belief there are sources of energy that can be made available for delivery to Citizens Utilities Company.

/s/ E. A. BENSON.

Subscribed and sworn to before me, a Notary Public, this 31st day of January, 1955.

[Seal] /s/ AURELIA E. HULL,
Notary Public.

My commission expires 6/22/56.

[Endorsed]: Filed January 31, 1955.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY, JAN. 31, 1955

Plaintiff's Motion for Restoration and Continuance of Restraining Order Pending Appeal comes on regularly for hearing this day. Joseph S. Jenckes, Jr., Esquire, appears as counsel for the Plaintiff. John H. Mathews, Esquire, and Daniel McCrory, Esquire, appear as counsel for the defendants Aloysius L. Kunkel, Howard C. Schriber and Albert E. Hamilton. Everett Gordon, Esquire, Assistant United States Attorney, appears as counsel for the defendants E. G. Nielson and Lloyd G. Hudlow.

Patricia Todd is now duly sworn to act as Court Reporter herein.

Said Motion for Restoration and Continuance of Restraining Order Pending Appeal is now duly argued by respective counsel, and

It Is Ordered that said Motion for Restoration and Continuance of Restraining Order Pending Appeal is denied.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Arizona—ss.

I, Wm. H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Citizens Utilities Company, a corporation, Plaintiff, vs. E. G. Nielson, Lloyd G. Hudlow, Aloysius L. Kunkel, Howard C. Schriber, Albert E. Hamilton, Defendants, numbered Civil 427 Prescott, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the civil docket entries and minute entries are true and correct copies of the originals thereof remaining in my office in the City of Tucson, State and District aforesaid.

I further certify that said original documents, and

said copies of the civil docket entries and of the minute entries, constitute the record on appeal in said case, as designated in the Designation of Contents of Record on Appeal filed therein and made a part of the record attached hereto, and the same are as follows, to wit:

1. Civil Docket Entries, including Clerk's notation of entry of order dismissing.

2. Complaint, filed December 24, 1954.

3. Temporary Restraining Order and Order to Show Cause, entered and filed December 24, 1954.

4. Bond for Temporary Restraining Order, filed December 24, 1954.

5. Minute entry of December 31, 1954, (Continuing Return Day on Order to Show Cause and increasing bond on Temporary Restraining Order).

6. Bond for Temporary Restraining Order, filed December 24, 1954.

7. Summons with Marshal's Return, filed January 4, 1955.

8. Motion to Dismiss of the defendants Aloysius L. Kunkel and Howard C. Schriber, filed January 11, 1955.

9. Motion to Dismiss of the defendant Albert E. Hamilton, filed January 11, 1955.

10. Motion to Dismiss and to Vacate Temporary Restraining Order of the defendants E. A. Benson and Frederick C. Keller, filed January 11, 1955.

11. Memorandum in Support of the Motion of the defendants E. A. Benson and Frederick C. Keller, filed January 11, 1955.

12. Motion to Dismiss and to Quash Service of the defendants E. G. Nielson and Lloyd G. Hudlow, filed January 11, 1955.

13. Memorandum in Support of the Motion of defendants E. G. Nielson and Lloyd G. Hudlow, filed January 11, 1955.

14. Notice of Hearing of Defendants' Motions, filed January 11, 1955.

15. Minute entry of January 17, 1955 (hearing on defendants' motions).

16. Minute entry of January 19, 1955 (order granting defendants' motions to dismiss).

17. Memorandum in Opposition to Defendants' Motions to Dismiss, filed January 20, 1955.

18. Minute entry of January 21, 1955 (order dismissing Complaint and quashing Restraining Order).

19. Reporter's Transcript of Proceedings of Hearing, filed January 21, 1955.

20. Plaintiff's Motion for Restoration and Continuance of Restraining Order Pending Appeal, filed January 24, 1955.

21. Minute entry of January 24, 1955 (order shortening time for hearing of Plaintiff's Motion for Restoration and Continuance of Restraining Order Pending Appeal and fixing time for hearing).

22. Plaintiff's Notice of Appeal, filed January 24, 1955.

23. Plaintiff's Cost Bond on Appeal, filed January 24, 1955.

24. Plaintiff's Designation of Contents of Record on Appeal, filed January 24, 1955.

25. Defendants' Memorandum in Opposition to Plaintiff's Motion to Restore Temporary Restraining Order, filed January 31, 1955.

26. Affidavit of E. A. Benson, Project Manager of the Parker-Davis Project, Bureau of Reclamation, United States Department of the Interior, filed January 31, 1955.

27. Minute entry of January 31, 1955 (order denying Plaintiff's Motion for Restoration and Continuance of Restraining Order Pending Appeal).

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of \$3.20 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court at Tucson, Arizona, this 5th day of February, 1955.

[Seal]

WM. H. LOVELESS,
Clerk;

By /s/ CATHERINE A. DOUGHERTY,
Chief Deputy.

[Endorsed]: No. 14644. United States Court of Appeals for the Ninth Circuit. Citizens Utilities Company, a Corporation, Appellant, vs. E. G. Nielson, Lloyd G. Hudlow, Aloysius L. Kunkel, Howard C. Schriber, and Albert A. Hamilton, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed February 7, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14644

CITIZENS UTILITIES COMPANY, a Corporation,
tion,

Appellant,

vs.

E. G. NIELSON, LLOYD G. HUDLOW,
ALOYSIUS L. KUNKEL, HOWARD C.
SCHRIBER, and ALBERT E. HAMILTON,
Appellees.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD

Statement of Points

Comes now the Appellant and pursuant to Rule 17(6) of the rules of this Court submits a concise statement of the points on which it intends to rely:

1. In quashing the service of summons and dismissing the Complaint as to the Appellees E. G. Nielson and Lloyd G. Hudlow, the lower court erred for the reason that said Appellees appeared by their attorney on the 31st day of December, 1954, and consented to the continuance of the temporary restraining order theretofore entered herein and to the hearing of the order to show cause why a temporary injunction should not be granted upon the 17th day of January, 1955, conditioned upon Appellant being required to increase the bond on temporary restraining order to the sum of Ten Thousand Dollars (\$10,000) and thereby submitted themselves to the jurisdiction of the Court and waived their privilege of objecting to the jurisdiction of the Court upon the ground of improper venue.

2. In dismissing the Complaint upon the motion of Appellees Aloysius L. Kunkel and Howard C. Schriber the lower court erred for the reason that the Complaint stated a cause of action against the Appellees Nielson, Hudlow, Kunkel and Schriber for injunctive relief in that:

(a) Appellees are in control of the electrical generating and distribution facilities of the Hoover Dam Power Plant.

(b) Under the provisions of Section 5 of the Boulder Canyon Project Act (43 U.S.C.A., §1617(d)), Appellant is entitled to a continuation of the delivery to it of Hoover Dam electrical power in the manner and upon the terms and conditions

under which it was receiving such electrical power during the year 1954 and prior thereto.

(c) The threats of the Appellees to discontinue the delivery of electrical energy to Appellant (and their actual discontinuance of such deliveries subsequent to the quashing of the temporary restraining order herein) are illegal and are beyond or in want of statutory authority and may be corrected by suit against them individually; this is not an action against the United States.

(d) Appellees are withholding electrical energy from Appellant in excess of and contrary to the powers conferred upon them; a decree of injunction herein will effectively grant the relief desired by expending itself upon subordinate officials or agents who are before the Court; the Secretary of the Interior is not an indispensable party.

(e) Appellant does not have an adequate remedy at law.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ J. S. JENCKES, JR.,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 15, 1955.

No. 14645

United States
Court of Appeals
for the Ninth Circuit

See Vol. 2924

FRED I. PUTNAM and JAMES A. OVERMAN,
Appellants,
vs.

HARRY C. LOWER, JOHN KADLEC, GEORGE
S. HERNING, EDGAR L. PEECHER,
WILLIAM E. BARQUIST and NORMAN L.
BUNKER, Appellees.

Transcript of Record

Appeal from the United States District Court for the Western
District of Washington, Northern Division

FILED

JUL 11 1955

PAUL R. O'BRIEN, CLERK



No. 14645

United States
Court of Appeals
for the Ninth Circuit

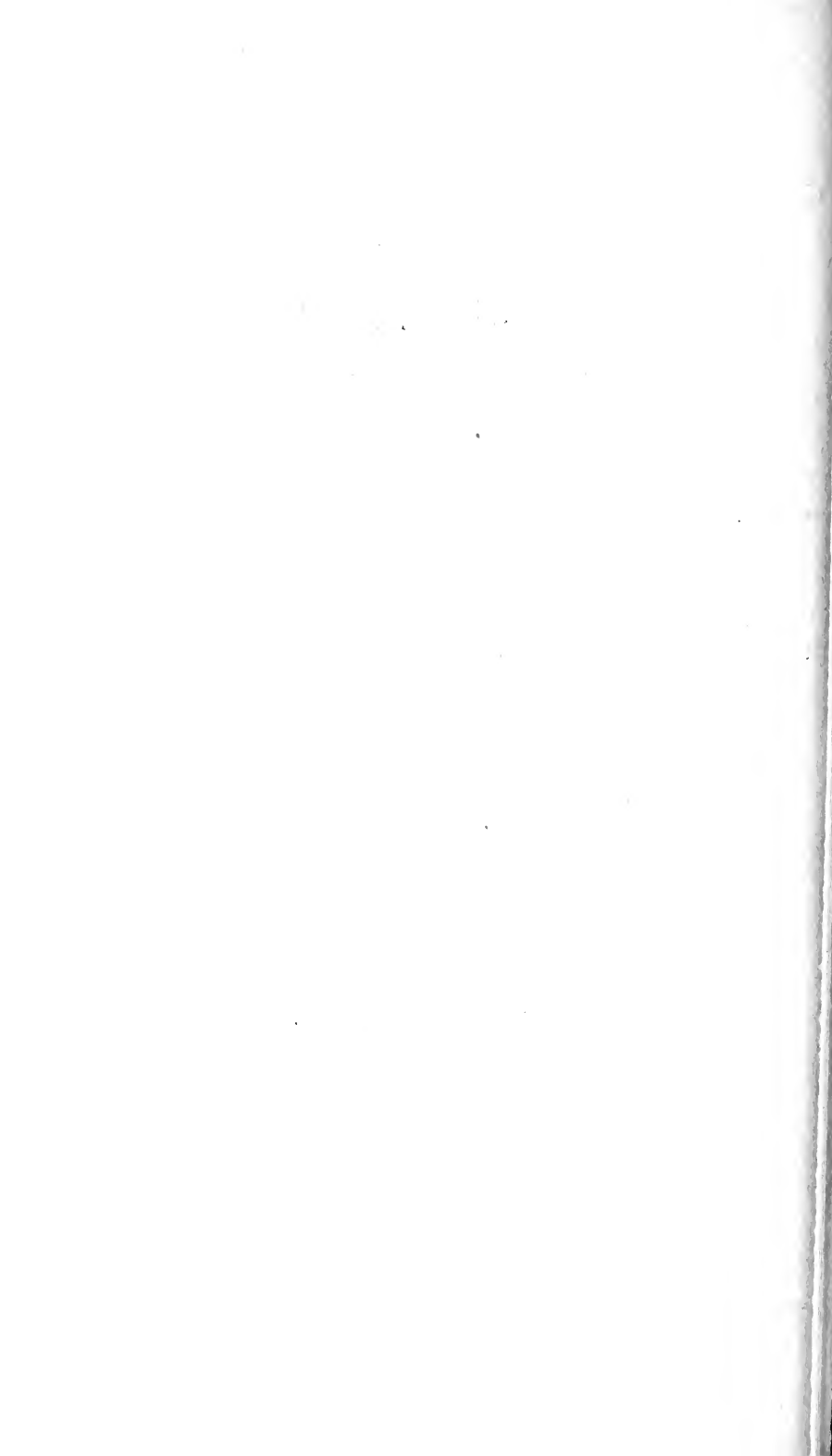
FRED I. PUTNAM and JAMES A. OVERMAN,
Appellants,

vs.

HARRY C. LOWER, JOHN KADLEC, GEORGE
S. HERNING, EDGAR L. PEECHER,
WILLIAM E. BARQUIST and NORMAN L.
BUNKER, Appellees.

Transcript of Record

Appeal from the United States District Court for the Western
District of Washington, Northern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS:

WILLIAM H. BOTZER of Messrs. Peyser, Car-
tano, Botzer & Chapman,
1415 Joseph Vance Bldg., Seattle 1, Wash.

Proctor for Appellants, Fred I. Putnam
and James A. Overman.

BOGLE, BOGLE and GATES,
M. BAYARD CRUTCHER,
603 Central Bldg., Seattle 4, Washington,
For Respondents Harry C. Lower and
John Kadlec.

ROBERT B. ALLISON,
400 Central Bldg., Seattle 4, Washington,
LEWIS S. ARMSTRONG,
760 Central Bldg., Seattle 4, Washington,
For Respondents George S. Herning, Ed-
gar L. Peecher and William E. Barquist.

ROBERT C. WELLS,
2703 Smith Tower, Seattle 4, Washington,
Proctor for Norman L. Bunker.

ANDERSON & COLLINS,
1114 Vance Bldg., Seattle, Washington.
Proctors for Robert J. Tobin.



In the United States District Court for the Western District of Washington, Northern Division

In Admiralty—No. 16039

HARRY C. LOWER, Libelant,
vs.

THE Oil Screw SILVER SPRAY, her engines,
tackle, apparel, furniture and equipment, and
ROBERT F. TOBIN, Respondents.

LIBEL

To the Honorable the Judges of the Above Entitled Court:

The libel of Harry C. Lower against the oil screw Silver Spray of Seattle, Washington, Official No. 250,538, her engines, tackle, apparel, furniture and equipment, and against Robert F. Tobin, in a cause of wages and damages, civil and maritime, alleges as follows:

Action Under Special Rule For Seamen to Sue
Without Security and Prepayment of Fees

I.

At the times herein mentioned the respondent oil screw vessel Silver Spray, was, and still is, a vessel documented under the laws of the United States, at the Port of Seattle, in this District, and owned by the respondent Robert F. Tobin, a resident of the City of Spokane, Washington.

II.

Said vessel is now moored in navigable waters within the Port of Seattle, and within the jurisdiction of this Honorable Court.

III.

On or about April 17, 1954, the respondent Robert F. Tobin, as master of the said vessel, hired libelant as a member of the crew of said vessel for the 1954 tuna fishing season, on a 1/10th share of the catch, and represented to him that said vessel would engage in fishing for tuna from the Port of San Diego, California.

IV.

Thereafter and on or about April 21, 1954, libelant joined the said vessel at Seattle, Washington, and engaged in work as a member of the crew thereof in preparing said vessel for sea.

V.

During the month of May, 1954 the respondent Tobin took the said vessel to Ketchikan, Alaska, on what was represented to libelant and the other crew members to be a shake-down cruise preliminary to taking it to San Diego for the tuna fishing season. The said respondent then left the vessel at the Port of Ketchikan, and abandoned her without notice to the libelant or other members of the crew.

VI.

Said vessel returned to the Port of Seattle on or about June 3, 1954. The respondent Tobin then failed and refused to rejoin the vessel, and has since

failed to provide the vessel with any funds, provisions or outfit to continue the season.

VII.

Libelant left the said vessel at the Port of Seattle on June 5, 1954, the said owner being absent and his whereabouts still unknown. Libelant has been discharged, without receiving any wages whatsoever, and without his consent, and without any fault on his part.

VIII.

On information and belief, libelant's share of the catch during the 1954 tuna fishing season would have been worth the sum of \$5,000.00, had the said fishing venture been fulfilled as promised to libelant by the respondent Tobin.

IX.

Libelant's services on board the said vessel between March 21, 1954, and June 5, 1954, were reasonably worth the sum of \$600.00.

X.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, libelant prays:

1. That process in due form of law according to the course and practice of this Court in causes of admiralty and maritime jurisdiction may issue against the said oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, and that all persons having any interest therein

may be cited to appear and answer under oath all and singular the matters aforesaid.

2. That the said respondent Robert F. Tobin be required to appear and answer all and singular the matters aforesaid.

3. That the court enter a decree herein for libelant in the sum of \$5,000.00, and libelant's costs, and that the said vessel, her engines, tackle, apparel, furniture and equipment be sold in the manner provided by law to answer the decree for the amount adjudged due to libelant herein, and that libelant do have and recover of the respondent Robert F. Tobin the amount of any deficiency resulting from the sale of said vessel, and that judgment therefor against said respondents be entered herein in the manner provided by law.

4. That the Court shall direct the manner in which actual notice of the commencement of this suit shall be given by libelant to the master or other ranking officer or caretaker of the said oil screw vessel Silver Spray, and to any person who has recorded a notice of claim for any undischarged lien upon said vessel as provided in Section 30 of the Ship Mortgage Act, 1920.

5. That libelant have such other and further relief as in the premises he may be entitled to receive.

/s/ BOGLE, BOGLE & GATES,

/s/ CLAUDE E. WAKEFIELD,

/s/ M. BAYARD CRUTCHER,

Proctors for Libelant

Duly Verified.

[Endorsed]: Filed June 10, 1954.

[Title of District Court and Cause.]

MONITION AND ATTACHMENT

The President of the United States of America
To the Marshal of the United States for the Western District of Washington, Greeting:

Whereas, a Libel hath been filed in the United States District Court for the Western District of Washington, on the 10th day of June, in the year of our Lord one thousand nine hundred and fifty four, by Harry C. Lower, Libellant vs. The Oil Screw Silver Spray, her engines, tackle, apparel, furniture and equipment, and Robert F. Tobin, Respondents, for the reasons and causes in the said Libel mentioned, and praying the usual process and monition of the said Court in that behalf be made, and that all persons interested in the said Oil Screw Silver Spray, her tackle, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said Oil Screw Silver Spray, her tackle, etc., may for the causes in the said Libel mentioned, be condemned and sold to pay the demands of the Libellant.

You Are Therefore Hereby Commanded to attach the said Oil Screw Silver Spray, her tackle, etc., and to retain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear

before the said Court, to be held at Seattle, in the Western District of Washington, on the 30th day June, A.D. 1954, at 10 o'clock in the forenoon of the same day, if that day shall be a day of Jurisdiction, otherwise on the next day of Jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof together with this writ.

Witness, the Hon. John C. Bowen, Judge of said Court, at the City of Seattle, in the Western District of Washington, this 10th day of June in the year of our Lord one thousand nine hundred and fifty four and of our independence the one hundred and seventy-eighth.

MILLARD P. THOMAS,
Clerk

/s/ By J. THORNBURGH,
Deputy Clerk

Marshal's Return

I hereby certify and return that in obedience to the attached Monition and Attachment, I attached the Oil Screw Silver Spray, her engines, tackle, apparel, furniture and equipment, at Seattle, Washington, at 3:35 p.m. June 10, 1954, and have her in my custody. I have given due notice to all persons claiming the same, or knowing or having anything to say why same should not be condemned and sold pursuant to the prayer of the Libel, that they

be and appear before this Court to be held at Seattle in the Western District of Washington, on the 30th day of June, 1954, by causing a Notice to be published in The Daily Journal of Commerce, Seattle, Washington, on the 12th day of June, 1954, and by posting like Notice on the seized Oil Screw Silver Spray, at 1515 Fairview Avenue North, Seattle.

A true copy of the Monition and Attachment, with copy of Libel, was served on Helge G. Oger, engineer on board the boat, at 1515 Fairview Avenue North, Seattle, Washington, in whose custody I found the above Oil Screw Silver Spray.

W. B. PARSONS, U. S. Marshal

/s/ By PYRL J. FORCIER, Deputy

Marshal's fee, \$2.00; Expense, 40c; Advertising, \$14.00; Total, \$16.40.

Affidavit of Publication

State of Washington,
County of King—ss.

L. J. Brown, being first duly sworn, on oath deposes and says that he is the business manager and one of the publishers of The Daily Journal of Commerce, a daily newspaper. That said newspaper is a legal newspaper and it is now and has been for more than six months prior to the date of the publication hereinafter referred to, published in the English language continuously as a daily newspaper in Seattle, King County, Washington, and it is now

and during all of said time was printed in an office maintained at the aforesaid place of publication of said newspaper. That the said Daily Journal of Commerce was on the 12th day of June, 1941, approved as a legal newspaper by the Superior Court of said King County.

That the annexed is a true copy of U. S. Marshal's Notice as it was published in the regular issue (and not in supplement form) of said newspaper on the 12th day of June, 1954, and that said newspaper was regularly distributed to its subscribers during all of said period.

/s/ L. J. BROWN

Subscribed and sworn to before me this 12th day of June, 1954.

[Seal] /s/ E. CAMPBELL,
Notary Public in and for the State of Washington,
residing at Seattle.

U. S. Marshal's Notices

Notice. Whereas, on the 10th day of June, 1954, Harry C. Lower, Libelant, by Bogle, Bogle & Gates of Seattle, Washington, Proctors for Libelant, filed a libel in the District Court of the United States for the Western District of Washington, against the Oil Screw Silver Spray, her engines, tackle, apparel, furniture and equipment, and Robert F. Tobin, Respondents, in a cause of action civil and maritime, numbered 16039, for damages in the sum of \$5,000.00. And whereas, by virtue of process in due form of law, to me directed, I have attached

and retain the same in my custody. Notice is hereby given to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said court, to be held at Seattle, Washington, in the Western District of Washington, on the 30th day of June, A.D. 1954, at ten o'clock in the forenoon of the same day, if that day shall be a day of Jurisdiction, otherwise on the next day of Jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. W. B. Parsons, U. S. Marshal. (3224-M)

[Endorsed]: Filed June 15, 1954.

II.

Said vessel is now moored in navigable waters within the Port of Seattle, and within the jurisdiction of this Honorable Court.

III.

That on or about April 14, 1954, the respondent Robert F. Tobin, as master of said vessel, hired intervening libelant Kadlec as a member of the crew of said vessel for the 1954 tuna fishing season; that said intervening libelant was hired on the basis of 1/10th share of the catch; that it was represented to said intervening libelant that said vessel would engage in fishing for tuna during the 1954 fishing season from some port in the State of California.

IV.

That thereafter, and on or about April 23, 1954, this intervening libelant joined the said vessel at Seattle, Washington and engaged in work as a member of the crew thereof in preparing said vessel for sea.

V.

During the month of May, 1954 the respondent Tobin took the said vessel to Ketchikan, Alaska, on what was represented to this intervening libelant and the other crew members to be a shake-down cruise preliminary to taking it to San Diego for the tuna fishing season. The said respondent then left the vessel at the Port of Ketchikan, and abandoned her without notice to this intervening libelant or other members of the crew.

VI.

Said vessel returned to the Port of Seattle on or about June 3, 1954. The respondent Tobin then failed and refused to rejoin the vessel, and has since failed to provide the vessel with any funds, provisions or outfit to continue the season.

VII.

This intervening libelant left the said vessel at the Port of Seattle on June 5, 1954, the said owner being absent and his whereabouts still unknown. This intervening libelant has been discharged, without receiving any wages whatsoever, and without his consent, and without any fault on his part.

VIII.

On information and belief, this intervening libelant's share of the catch during the 1954 tuna fishing season would have been worth the sum of \$5,000.00, had the said fishing venture been fulfilled as promised to intervening libelant by the respondent Tobin.

IX.

This intervening libelant's services on board the said vessel between April 23, 1954, and June 5, 1954, were reasonably worth the sum of \$400.00.

X.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

The intervening libel of Doss R. Payne against the oil screw Silver Spray of Seattle, Washington, Official No. 250,538, her engines, tackle, apparel, furniture and equipment, and against Robert F. Tobin, in a cause of wages and damages, civil and maritime, alleges as follows:

Action Under Special Rule for Seamen to Sue
Without Security and Prepayment of Fees.

I.

At the times herein mentioned the respondent oil screw vessel Silver Spray, was, and still is, a vessel documented under the laws of the United States, at the Port of Seattle, in this District, and owned by the respondent Robert F. Tobin, a resident of the City of Spokane, Washington.

II.

Said vessel is now moored in navigable waters within the Port of Seattle, and within the jurisdiction of this Honorable Court.

III.

That during the month of March, 1954, the respondent Robert F. Tobin, as master of the said vessel, hired this intervening libellant as a member of the crew of said vessel for the 1954 fishing season on a 1/10th share of the catch, and represented to him that said vessel would engage in fishing for tuna from San Diego, California.

IV.

That thereafter, and during the month of April,

1954, this intervening libelant joined the said vessel at Seattle, Washington, and engaged in work as a member of the crew thereof in preparing said vessel for sea.

V.

That during the month of May, 1954, respondent Tobin took the said vessel to Ketchikan, Alaska, on what was represented to be a shake-down cruise preliminary to the use of said ship for the tuna fishing season; that at Ketchikan, Alaska, said respondent Tobin unjustifiably and without cause discharged this intervening libelant and directed his removal from said vessel; that said intervening libelant has not received any wages whatsoever for the said voyage of the said vessel to Alaska or any wages whatsoever, and was discharged without his consent and without any fault on his part.

VI.

That on information and belief this intervening libelant's share of the catch during the 1954 tuna fishing season would have been worth the sum of \$5,000 had the said fishing venture been fulfilled as promised, and had this intervening libelant not been wrongfully discharged from the services of said vessel.

VII.

That this intervening libelant's services on board the said vessel during the months of March, April, May and June, 1954, was reasonably worth the sum of \$700.00.

VIII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

The intervening libel of Norman L. Bunker against the oil screw Silver Spray of Seattle, Washington, Official No. 250,538, her engines, tackle, apparel, furniture and equipment, and against Robert F. Tobin, in a cause of wages and damages, civil and maritime, alleges as follows:

Action Under Special Rule for Seamen to Sue
Without Security and Prepayment of Fees.

I.

At the times herein mentioned the respondent oil screw vessel Silver Spray, was, and still is, a vessel documented under the laws of the United States, at the Port of Seattle, in this District, and owned by the respondent Robert F. Tobin, a resident of the City of Spokane, Washington.

II.

Said vessel is now moored in navigable waters within the Port of Seattle, and within the jurisdiction of this Honorable Court.

III.

That on or about June 2, 1954, respondent Robert F. Tobin, as master of the said vessel, hired intervening libellant Bunker as a member of the crew of said vessel for the 1954 tuna fishing season on a 1/10th share of the catch, and represented to him

that said vessel would engage in fishing for tuna from the Port of San Diego, California; that said respondent further represented to intervening libelant Bunker that there was an experienced bait and refrigeration man aboard said vessel, and that the same would be provisioned and sent to San Diego, California.

IV.

That thereafter and on or about June 4, 1954, intervening libelant Bunker joined the said vessel at Seattle, Washington, ready, willing and able to perform his duties in the service thereof; that this intervening libelant stood by, ready, willing, qualified and able to perform all duties and services required aboard said ship until approximately June 14, 1954; that respondent Tobin failed and refused to join said vessel and has ever since failed to provide the vessel with any funds, provisions or outfit, or to send said vessel to sea.

V.

That intervening libelant Bunker left said vessel at the Port of Seattle, Washington, the said owner being absent and his whereabouts unknown; that this intervening libelant has been discharged without receiving any wages whatsoever or the return of his consideration and without any fault on his part; the said vessel and its owner have ever since failed and refused to perform their said obligations under the agreement hereinbefore set out, thereby depriving this intervening libelant of his services and return of services to said ship had said agreement been fulfilled; that each and every perform-

ance required of this intervening libelant in the service of said vessel and of respondent Tobin have been performed.

VI.

On information and belief, this intervening libelant's share of the catch during the 1954 tuna fishing season would have been worth the sum of \$5,000.00, had the said fishing venture been fulfilled as promised to intervening libelant by the respondent Tobin.

VII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, intervening libelants pray:

1. That each of them shall be allowed to intervene and be heard in this cause and that all persons having any interest therein may be cited to appear and answer under oath all and singular the matters aforesaid;

2. That the said respondent, Robert F. Tobin, be required to appear and answer all and singular the matters aforesaid;

3. That the court enter a decree herein for intervening libelants John Kadlec, Doss R. Payne and Norman L. Bunker in the sum of \$5,000.00 and each intervening libelant's costs, respectively, and that said vessel, her engines, tackle, apparel, furniture and equipment, be sold in the manner provided by law to answer the decree for the amount adjudged due to intervening libelants herein, respec-

against the oil screw Silver Spray of Seattle, Washington, official No. 250,538, her engines, tackle, apparel, furniture and equipment, and against Robert F. Tobin, in a cause of wages and damages, civil and maritime, alleges as follows:

Action Under Special Rule for Seamen to Sue
Without Security and Prepayment of Fees.

I.

At the times herein mentioned the respondent oil screw vessel Silver Spray was, and still is, a vessel documented under the laws of the United States, at the Port of Seattle, in this District, and owned by the respondent Robert F. Tobin, a resident of the City of Spokane, Washington.

II.

Said vessel is now moored in navigable waters within the Port of Seattle, and within the jurisdiction of this Honorable Court.

III.

That on or about May 4, 1954 the respondent Robert F. Tobin, as master of said vessel, hired additional intervening libelant William E. Barquist as a member of the crew of said vessel for the 1954 tuna fishing season; that said additional intervening libelant was hired on the basis of 1/10th share of the catch; that it was represented to said additional intervening libelant that said vessel would engage in fishing for tuna during the 1954 fishing season from some port in the State of California.

IV.

That thereafter, and on or about May 4, 1954 this additional intervening libelant joined the said vessel at Seattle, Washington and engaged in work as a member of the crew thereof in preparing said vessel for sea.

V.

During the month of May, 1954 the respondent Tobin took the said vessel to Ketchikan, Alaska, on what was represented to this additional intervening libelant and the other crew members to be a shake-down cruize preliminary to taking it to San Diego for the tuna fishing season. The said respondent then left the vessel at the Port of Ketchikan, and abandoned her without notice to this additional intervening libelant or other members of the crew.

VI.

Said vessel returned to the Port of Seattle on or about June 3, 1954. The respondent Tobin then failed and refused to rejoin the vessel, and has since failed to provide the vessel with any funds, provisions or outfit to continue the season.

VII.

This additional intervening libelant left the said vessel approximately one month after boarding the vessel, the said owner being absent and his whereabouts unknown. This additional intervening libelant has been discharged, without receiving any wages whatsoever, and without his consent, and without any fault on his part.

VIII.

On information and belief, this additional intervening libellant's share of the catch during the 1954 tuna fishing season would have been worth the sum of \$5,000.00, had the said fishing venture been fulfilled as promised to additional intervening libellant by the respondent Tobin.

IX.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

The intervening libel of Edgar L. Peecher against the oil screw Silver Spray of Seattle, Washington, official No. 250,538, her engines, tackle, apparel, furniture and equipment, and against Robert F. Tobin, in a cause of wages and damages, civil and maritime, alleges as follows:

Action Under Special Rule for Seamen to Sue
Without Security and Prepayment of Fees.

I.

At the times herein mentioned the respondent oil screw vessel Silver Spray was, and still is, a vessel documented under the laws of the United States, at the Port of Seattle, in this District, and owned by the respondent, Robert F. Tobin, a resident of the City of Spokane, Washington.

II.

Said vessel is now moored in navigable waters

within the Port of Seattle, and within the jurisdiction of this Honorable Court.

III.

That during the month of April, 1954, the respondent Robert F. Tobin, as master of the said vessel, hired this additional intervening libellant as a member of the crew of said vessel for the 1954 fishing season on a 1/10th share of the catch, and represented to him that said vessel would engage in fishing for tuna from San Diego, California.

IV.

That thereafter, and during the month of April, 1954, this additional intervening libellant joined the said vessel at Seattle, Washington, and engaged in work as a member of the crew thereof in preparing said vessel for sea.

V.

During the month of May, 1954 the respondent Tobin took the said vessel to Ketchikan, Alaska, on what was represented to this additional intervening libellant and the other crew members to be a shake-down cruise preliminary to taking it to San Diego for the tuna fishing season. The said respondent then left the vessel at the Port of Ketchikan, and abandoned her without notice to this additional intervening libellant or other members of the crew.

VI.

Said vessel returned to the Port of Seattle on or about June 3, 1954. The respondent Tobin then

failed and refused to rejoin the vessel, and has since failed to provide the vessel with any funds, provisions or outfit to continue the season.

VII.

This additional intervening libelant left the said vessel approximately one month after boarding the vessel, the said owner being absent and his whereabouts unknown. This additional intervening libelant has been discharged, without receiving any wages whatsoever, and without his consent, and without any fault on his part.

VIII.

That on information and belief this additional intervening libelant's share of the catch during the 1954 tuna fishing season would have been worth the sum of \$5,000.00 had the said fishing venture been fulfilled as promised, and had this additional intervening libelant not been wrongfully discharged from the services of said vessel.

IX.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, additional intervening libelants pray:

1. That each of them shall be allowed to intervene and be heard in this cause and that all persons having any interest therein may be cited to

appear and answer under oath all and singular the matters aforesaid;

2. That the said respondent, Robert F. Tobin, be required to appear and answer all and singular the matters aforesaid;

3. That the court enter a decree herein for additional intervening libelants, William E. Barquest and Edgar L. Peecher, in the sum of \$5,000.00 each and each additional intervening libelant's costs, respectively, and that said vessel, her engines, tackle, apparel, furniture and equipment, be sold in the manner provided by law to answer the decree for the amount adjudged due to additional intervening libelants herein, respectively, and that additional intervening libelants respectively, and each of them, do have and recover of the respondent Robert F. Tobin the amount of any deficiency resulting from the sale of said vessel, and that judgment therefor against said respondent be entered herein in the manner provided by law.

4. That these additional intervening libelants have such other and further relief, respectively, as they may be entitled to receive herein.

/s/ LEWIS S. ARMSTRONG,
Proctor for Additional Intervening
Libelants.

Acknowledgment of Service attached.

Duly Verified.

[Endorsed]: Lodged August 12, 1954.

[Endorsed]: Filed August 16, 1954.

In the United States District Court for the Western District of Washington, Northern Division

In Admiralty—No. 16039

HARRY C. LOWER, Libelant,
JOHN KADLEC, et al., Intervening Libelants,
GEORGE S. HERNING, Intervening Libelant,

vs.

THE Oil Screw SILVER SPRAY, etc., et al.,
Respondents.

INTERVENING LIBEL

To the Honorable Judges of the Above Entitled Court:

The intervening libel of George S. Herning against the Oil Screw Silver Spray of Seattle, Washington, Official No. 250,538, her engines, tackle, apparel, furniture and equipment, and against Robert F. Tobin, in a cause of wages and damages, civil and maritime, alleges as follows:

Action Under Special Rule for Seamen to Sue
Without Security and Prepayment of Fees.

I.

At the times herein mentioned the respondent oil screw vessel Silver Spray, was, and still is, a vessel documented under the laws of the United States, at the Port of Seattle, in this District, and owned by the respondent Robert F. Tobin, a resident of the City of Spokane, Washington.

II.

Said vessel is now moored in navigable waters within the Port of Seattle, and within the jurisdiction of this Honorable Court.

III.

That on or about the 27th day of April, 1954, the respondent Robert F. Tobin, as master of said vessel, hired intervening libelant Herning as a member of the crew of said vessel for the 1954 tuna fishing season; that said intervening libelant was hired on the basis of 1/10th share of the catch; that it was represented to said intervening libelant that said vessel would engage in fishing for tuna during the 1954 fishing season from some port in the State of California.

IV.

That thereafter, and on or about April 28, 1954, this intervening libelant joined the said vessel at Seattle, Washington and engaged in work as a member of the crew thereof in preparing said vessel for sea.

V.

During the month of May, 1954 the respondent Tobin took the said vessel to Ketchikan, Alaska, on what was represented to this intervening libelant and the other crew members to be a shake-down cruise preliminary to taking it to San Diego for the tuna fishing season. The said respondent then left the vessel at the Port of Ketchikan, and abandoned her without notice to this intervening libelant or other members of the crew.

VI.

Said vessel returned to the Port of Seattle on or about June 3, 1954. The respondent Tobin then failed and refused to rejoin the vessel, and has since failed to provide the vessel with any funds, provisions or outfit to continue the season.

VII.

This intervening libelant left the said vessel at the Port of Seattle on June 5, 1954, the said owner being absent and his whereabouts still unknown. This intervening libelant has been discharged, without receiving any wages whatsoever, and without his consent, and without any fault on his part.

VIII.

On information and belief, this intervening libelant's share of the catch during the 1954 tuna fishing season would have been worth the sum of \$5,000.00, had the said fishing venture been fulfilled as promised to intervening libelant by the respondent Tobin.

IX.

This intervening libelant's services on board the said vessel between April 28, 1954 and June 5, 1954, were reasonably worth the sum of \$800.00.

X.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, intervening libelant prays:

1. That he shall be entitled to intervene and be heard in this cause and that all persons having any interest therein may be cited to appear and answer under oath all and singular the matters aforesaid;

2. That the said respondent, Robert F. Tobin, be required to appear and answer all and singular the matters aforesaid;

3. That the court enter a decree herein for intervening libelant George S. Herning in the sum of \$5,000.00 and intervening libelant's costs, and that said vessel, her engines, tackle, apparel, furniture and equipment, be sold in the manner provided by law to answer the decree for the amount adjudged due to intervening libelant herein, and that intervening libelant have and recover of the respondent Robert F. Tobin the amount of any deficiency resulting from the sale of said vessel, and that judgment therefor against said respondent be entered herein in the manner provided by law;

4. That the intervening libelant have such other and further relief as he may be entitled to receive herein.

/s/ ROBERT B. ALLISON,
Proctor for Intervening Libelant.

Acknowledgment of Service attached.

[Endorsed]: Lodged August 12, 1954.

[Endorsed]: Filed August 16, 1954.

[Title of District Court and Cause.]

ORDER AUTHORIZING WITHDRAWAL OF PROCTOR

This matter having come on for hearing on August 16, 1954, upon the motion of Robert C. Wells for an order authorizing his withdrawal as proctor for intervening libelants John Kadlec, said motion being supported by the affidavit of said Payne and the affidavit of said Kadlec, containing the written consent of said intervening libelants to the withdrawal of said Robert C. Wells, and upon the affidavit of said Wells that differences have arisen between him and said intervening libelants and that said intervening libelants intended to proceed herein with other counsel, and the Court having considered the records and files herein and being fully informed in the premises, it is now

Ordered that the motion for order authorizing withdrawal as proctor by Robert C. Wells, should be, and the same is hereby granted as to John Kadlec.

Done in Open Court this 16th day of August, 1954.

/s/ JOHN C. BOWEN,
Judge.

Approved and presented by:

/s/ ROBERT C. WELLS,

Proctor for Intervening Libelants.

Approved and Notice of Presentation Waived:

/s/ M. BAYARD CRUTCHER,
of Proctor for Libelant.

Copy received and approved as to form:

/s/ LEONARD COLLINS,
of Proctors for Respondent and
Claimant, Robert F. Tobin.

Copy received and approved as to form:

/s/ LEWIS S. ARMSTRONG,
Proctor for additional intervening
libelants.

Copy received and approved as to form:

/s/ ROBERT B. ALLISON,
Proctor for intervening libelant,
George S. Herning.

Acknowledgment of Service attached.

[Endorsed]: Filed August 16, 1954.

In the United States District Court for the Western District of Washington, Northern Division

In Admiralty—No. 16039

HARRY C. LOWER, Libelant,
vs.

THE Oil Screw SILVER SPRAY, etc., et al.,
Respondents.

JOHN KADLEC, et al., Intervening Libelants,
FRED I. PUTNAM and JAMES A. OVERMAN,
Additional Intervening Libelant.

INTERVENING LIBEL IN REM AND IN PERSONAM

To the Honorable Judges of the United States District Court for the Western District of Washington, Northern Division:

Come now Fred I. Putnam and James A. Overman, intervening libelants in rem and in personam, and allege as follows:

I.

The Oil Screw "Silver Spray", respondent, registered for fishing and freight; length 77.5 feet, breadth 15.1 feet, depth 7.8 feet; is now within the Western District of Washington, Northern Division, and within the jurisdiction of this Honorable Court, and all libellants and the respondents above named, as parties to these admiralty proceedings are within the jurisdiction of this Honorable Court.

II.

Prior to April 28, 1954, these intervening libellants (hereinafter referred to as "Putnam" and "Overman") agreed to sell and did sell the Oil Screw "Silver Spray" to respondent Robert F. Tobin (hereinafter referred to as "Tobin") for the agreed purchase price of \$35,000.00, of which Tobin made a down payment of \$5,000.00, and on April 28, 1954, Tobin, as evidence of the balance due, executed and delivered to Putnam and Overman his promissory note in the principal sum of \$30,000.00 with the following conditions and provisions, namely:

\$30,000.00	Instalment Note	No.....
	Seattle, Wash., April 28, 1954	

For value received, I promise to pay to the order of Fred I. Putnam and James A. Overman, seven-twelfths and five-twelfths, respectively, Thirty Thousand and 00/100 (\$30,000.00) Dollars in Lawful Money of the United States of America, with interest thereon in like Lawful Money at the rate of 5 per cent per annum from date until paid, payable in 2 installments each year \$2500 or more in any one payment, including the full amount of interest due on this note at time of payment of each instalment. The first payment to be made on the 1st day of September, 1954, and a like payment on each June 1st and each September 1st thereafter until the whole sum, principal and interest, has been paid; if any of said instalments are not so paid, the whole sum of both principal and interest to become immediately due and collectible at the option of the

holder hereof. And in case suit or action is instituted to collect this note, or any portion thereof, I promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

Due September 1, 1961 at Seattle, Washington.

ROBERT J. TOBIN
(Robert J. Tobin)

III.

In order to secure the payment of the principal and interest of said promissory note above set forth, Tobin, as mortgagor, executed and delivered to Putnam and Overman, as mortgagees, a first, preferred mortgage dated April 28, 1954, and by the terms and provisions of said first, preferred mortgage Tobin admitted that he was justly indebted to Putnam and Overman as mortgagees in the sum of \$30,000.00, plus interest as therein provided, and granted, bargained, sold, and mortgaged unto said mortgagees the whole of the said Oil Screw "Silver Spray", together with her mast, bowsprit, boats, anchors, cables, chains, rigging, tackle, apparel, furniture and all other necessities thereunto pertaining and belonging, and said mortgage provided that if Tobin should pay or cause to be paid to the said mortgagees the debt aforesaid, together with interest as provided, and if said mortgagor should keep, perform and observe all and singular the covenants and promises in said promissory note and in the said mortgage, then the said mortgage and

the estate and rights thereby granted should cease, determine and be void; otherwise, to remain in full force and effect. That in fact Tobin violated the provisions of said mortgage in the following particulars:

1. By his failure to pay premiums he has caused a forfeiture of insurance coverage as provided for in the mortgage.

2. He has permitted the "Silver Spray" to be attached by The United States Marshal of this district.

3. He has declared that he cannot, and will not, make the \$2500.00 payment due September 1, 1954 as provided for in said promissory note.

4. By such violations the mortgagees deem themselves in danger of losing the debt and the whole thereof.

IV.

At the time the said first, preferred mortgage was executed, the said Oil Screw "Silver Spray" was and still is duly registered under the laws of the United States of America, having its home port at Seattle, State of Washington. The said first, preferred mortgage was duly filed for record in the Office of the Collector of Customs of the Port of Seattle, State of Washington, and was duly recorded in said Office of the Collector of Customs in Book No. 15PM, instrument No. 95, at 2:20 o'clock p.m. on the 28th day of April, 1954, which said record shows the name of the vessel, the names of the parties to the mortgage, the interest in the vessel mortgaged, and the amount and date of maturity

on September 1, 1961, in accordance with Section 30, subsection "c" of the Ship Mortgage Act of Congress of the United States, June 5, 1920.

The said first, preferred mortgage was endorsed upon the documents of the Oil Screw "Silver Spray" in accordance with the provisions of Section 30 of the Ship Mortgage Act of June 5, 1920, and was recorded as provided by subsection "c" thereof. An affidavit was endorsed upon the said mortgage to the effect that the mortgage was made in good faith and without any design to hinder, delay or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel. The said mortgage expressly provided that the mortgagee did not waive the preferred status of said mortgage. All of the acts and things required to be done by the said Ship Mortgage Act of June 5, 1920 in order to give to the said mortgage status of a first, preferred mortgage, were duly done or caused to be done, either by mortgagee or by Collector of Customs of the Port of Seattle, State of Washington.

VI.

The Collector of Customs of the Port of Seattle, State of Washington, upon recording of said first, preferred mortgage, delivered two certified copies thereof to the mortgagor who placed and used due diligence to retain one copy on board the said vessel to be exhibited by the master to any person having business with the vessel which might give rise to a maritime lien upon the vessel, or to the sale, conveyance of mortgage thereof; and these mortgagees

allege upon information and belief that at all times since then the master of said vessel upon the request of any such person has exhibited to him the documents of said vessel and the copy of said first, preferred mortgage placed on board thereof. That upon the date of the execution of said mortgage, namely April 28, 1954, the mortgagor Tobin acknowledged receipt of two certified copies of the said mortgage, and on said date and upon the same instrument, Tobin as master of said vessel acknowledged receipt of one certified copy of said mortgage for placement on board the vessel. Further, upon said date, the said Tobin executed a certain prior and subsequent liens affidavit in favor of mortgagees Putnam and Overman wherein he certified there were no prior liens or obligations to his knowledge, further, there would not be future liens incurred without the consent of the mortgagees, with certain exceptions.

VII.

That Tobin, by reason of his violations of the terms and provisions of said mortgage, has forfeited all right, title, and interest in and to the Oil Screw "Silver Spray" and Putnam and Overman are entitled to a foreclosure of said mortgage. There is now due and owing upon said promissory note a principal balance of \$30,000.00 together with interest thereon at the rate of 5% per annum from April 28, 1954. Said promissory note provided that in the event suit is instituted to collect the amount due and owing the maker Tobin shall pay such additional sums as the Court may adjudge reasonable

as attorney's fees, and the sum of \$3000.00 is reasonable to be awarded to Putnam and Overman for and as proctor's fees herein. That said sums, together with all costs of suit, Marshal's charges, and costs of sale are within the lien of said first, preferred mortgage and chargeable to the proceeds of the Oil Screw "Silver Spray" upon due and regular foreclosure proceedings.

VIII.

The original libel filed herein together with the intervening libels were instituted for fishing shares for the 1954 season if the fishing venture had been fulfilled, and the libellant and intervening libellants claim, or may claim, to have a lien for shares against the vessel. Putnam and Overman allege that none of said libellants have a lien against the vessel, and if they claim to have liens they are junior, inferior and subordinate to the first, preferred mortgage lien against the Oil Screw "Silver Spray".

That all and singular the premises are within the admiralty jurisdiction of this Honorable Court.

Wherefore, intervening libellants Putnam and Overman Pray:

1. That process in due form of law according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the said Oil Screw "Silver Spray", her mast, bowsprit, boats, anchors, cables, chains, rigging, tackle, apparel, furniture, and all other necessaries thereunto appertaining and belonging;

that all persons claiming any interest in the said vessel may be cited to appear and answer the matters aforesaid, and that the vessel and appurtenances described may be condemned and sold to pay the demands and claims aforesaid, namely, the sum of \$30,000.00 together with interest at the rate of 5% per annum from April 28, 1954 until paid; and in addition thereto, the sum of \$3000.00 as a reasonable proctor's fee, together with costs of suit, costs of foreclosure, Marshal's charges and to pay any and all other amounts required to be paid by the mortgagor to the mortgagee under the said first, preferred mortgage for which evidence may be offered and proof be made.

2. That the said first, preferred mortgage dated April 28, 1954, be declared to be a valid and subsisting first and prior lien upon the Oil Screw "Silver Spray" and appurtenances, prior and superior to the interests, liens or claims of any and all persons, firms or corporations whatsoever, and particularly prior and superior to the claims of the libellant and other intervening libellants herein and each of them.

3. That in the default of the payment of all sums found due and payable to your intervening libellant under the said promissory note and first, preferred mortgage within the time to be limited by a decree of this Honorable Court, it may be decreed that any and all persons, firms and corporations claiming any interest in the said respondent vessel are forever barred and foreclosed of and from all right or equity of redemption, or claim of,

in or to the said mortgaged respondent vessel and her appurtenances and every part thereof.

4. That in due form and by due process a citation be issued to the respondent Robert J. Tobin to appear and answer the allegations of this libel, or upon his failure to do so, a default in due course be entered against said respondent, and libellant further prays that a judgment be entered against said respondent for such deficiency as may result and be represented by the difference between libellants' total recovery as herein prayed for and the amount recovered upon due and regular sale of said respondent vessel by the United States Marshal.

5. That these intervening libellants Putnam and Overman may have such further relief as in law and justice they may be entitled to receive.

/s/ STEPHEN V. CAREY,

Proctor for Intervening Libellants Fred I. Putnam
and James A. Overman.

Acknowledgment of Service attached.

Duly Verified.

[Endorsed]: Filed August 25, 1954.

[Title of District Court and Cause.]

MONITION AND ATTACHMENT

The President of the United States of America
To the Marshal of the United States for the West-
ern District of Washington, Greeting:

Whereas, an intervening Libel hath been filed in

the United States District Court for the Western District of Washington, on the 25th day of August, in the year of our Lord one thousand nine hundred and fifty-four, by Fred I. Putnam and James A. Overman for the reasons and causes in the said Intervening Libel mentioned, and praying the usual process and monition of the said Court in that behalf be made, and that all persons interested in the said Oil Screw Vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, or vessel, her tackle, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said Oil Screw Vessel Silver Spray, her engines, tackle, apparel, furniture and equipment or vessel, her tackle, etc., may for the causes in the said Intervening Libel mentioned, be condemned and sold to pay the demands of the Libellant.

You Are Therefore Hereby Commanded to attach the said Oil Screw Vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, or vessel, her tackle, etc., and to retain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said Court, to be held at Seattle, in the Western District of Washington, on the 14th day September, A.D. 1954, at 10 o'clock in the forenoon of the same day, if that day shall be a day of Jurisdiction, otherwise on the next day of

Jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof together with this writ.

Witness, the Hon. John C. Bowen, Judge of said Court, at the City of Seattle, in the Western District of Washington, this 25th day of August, in the year of our Lord one thousand nine hundred and fifty-four and of our independence the one hundred and seventy-ninth.

MILLARD P. THOMAS, Clerk

/s/ By MARION MILLER, Deputy Clerk

Marshal's Return

I hereby certify and return that in obedience to the attached Monition and Attachment, I attached the Oil Screw Vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, at Seattle, Washington, on the 26th day of August, 1954, and have her in my custody. I have given due notice to all persons claiming the same, or knowing or having anything to say why same should not be condemned and sold pursuant to the prayer of Intervening Libel, that they be and appear before this Court to be held at Seattle in the Western District of Washington, on the 14th day of September, 1954, by causing a Notice to be published in The Daily Journal of Commerce, Seattle, Washington, on the 27th day of August, 1954, and by posting like Notice on the seized Oil Screw Vessel Silver Spray, at

Lake Union Drydock, 1515 Fairview Avenue North, Seattle, Washington.

A true copy of the Monition and Attachment, with copy of the Intervening Libel in Rem and In Personam, was served on Frank H. Oliver, Superintendent, Lake Union Drydock, 1515 Fairview Avenue North, Seattle, Washington, in whose custody I found the Oil Screw Vessel Silver Spray.

W. B. PARSONS, U. S. Marshal

/s/ By PYRL J. FORCIER, Deputy

Marshal's fee, \$2.00; Expense, 40c; Advertising, \$14.80; Total, \$17.20.

Affidavit of Publication

State of Washington,
County of King—ss.

L. J. Brown, being first duly sworn, on oath deposes and says that he is the business manager and one of the publishers of The Daily Journal of Commerce, a daily newspaper. That said newspaper is a legal newspaper and it is now and has been for more than six months prior to the date of the publication hereinafter referred to, published in the English language continuously as a daily newspaper in Seattle, King County, Washington, and it is now and during all of said time was printed in an office maintained at the aforesaid place of publication of said newspaper. That the said Daily Journal of Commerce was on the 12th day of June, 1941, ap-

proved as a legal newspaper by the Superior Court of said King County.

That the annexed is a true copy of U. S. Marshal Notice as it was published in the regular issue (and not in supplement form) of said newspaper on the 27th day of August, 1954, and that said newspaper was regularly distributed to its subscribers during all of said period.

/s/ L. J. BROWN

Subscribed and sworn to before me this 27th day of August, 1954.

[Seal] /s/ E. CAMPBELL,
Notary Public in and for the State of Washington,
residing at Seattle.

U. S. Marshal's Notices

Notice. Whereas, on the 25th day of August, 1954, Fred I. Putnam and James A. Overman, Intervening Libelants, by Stephen V. Carey of Seattle, Washington, Proctors for Libelant, filed an intervening libel in the District Court of the United States for the Western District of Washington, against the Oil Screw Vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, in a cause of action civil and maritime, numbered 16039, for Preferred Mortgage in the sum of \$30,000.00 with interest. And whereas, by virtue of process in due form of law, to me directed, I have attached and retain the same in my custody. Notice is hereby given to all persons claiming the same, or knowing or having anything to say why the same

should not be condemned and sold pursuant to the prayer of the said Intervening Libel, that they be and appear before the said court, to be held at Seattle, Washington, in the Western District of Washington, on the 14th day of September, A.D. 1954, at ten o'clock in the forenoon of the same day, if that day shall be a day of Jurisdiction, otherwise on the next day of Jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. W. B. Parsons, U. S. Marshal. (4172-M)

[Endorsed] Filed August 30, 1954.

[Title of District Court and Cause.]

ANSWER AND AFFIRMATIVE DEFENSES
OF RESPONDENT TOBIN TO LIBEL
AND INTERVENING LIBELS OF LOWER,
BUNKER, HERNING, PEECHER AND
BARQUIST

To the Honorable Judges of the Above Entitled
Court:

Comes now the respondent Robert J. Tobin and in answer to the libel and intervening libels as above designated denies and alleges as follows:

I.

In answer to the libel and said intervening libels collectively, respondent admits that each of the said libelants were entitled to a 1/10th share of the catch; and further admits the vessel sailed on a shake-down cruise to Alaska; and further admits

the vessel returned to Seattle and the libelants left the vessel.

Respondent denies each and every other allegation contained in the libel and intervening libels and demands strict proof thereof.

As and for a First Affirmative Defense respondent alleges:

Each of the libelants appearing in the above caption signed a fishing share agreement on the Silver Spray in form as attached hereto as Exhibit A, the terms of which are incorporated herein as though set forth in full. Each of the libelants became dissatisfied with the proposed venture but violated said contract by refusing to give respondent 30 days oral notice of intention to withdraw from the venture. The contract further provides that in the event libelants or any of them leaves the vessel or is dismissed the respondent shall have ninety days within which to sell shares and make full refunds of the amounts invested by libelants. The libelants further violated the contract by causing a seizure of the vessel by the United States Marshal thus preventing respondent to sell the working shares and make full refunds.

As and for a Second Affirmative Defense respondent alleges:

None of the libelants has had fishing or sailing experience and each was fully informed and well knew the risks attendant upon tuna fishing and that

under such circumstances wages could not be and were not contracted for or agreed upon either for the shake-down cruise to Alaska or thereafter, and each libelant was informed and knew that earnings, if any, were to be charged against fishing profits, if any, at the end of the voyage.

That not being seamen suing for, or entitled to, wages, none of the libelants are entitled to any relief under 28 USCA 1916 without prepaying costs and posting security.

As and for a Third Affirmative Defense respondent alleges:

At all times up to the seizure of the vessel by the United States Marshal, the respondent was willing to continue with the proposed fishing operation, but upon return to the Port of Seattle the libelants entirely upon their own initiative and volition quit the vessel. Libelants did not and do not have maritime liens for speculative and prospective profits on fish that were not caught, and by causing the vessel to be wrongfully seized, the libelants have caused respondent to suffer damages by substantial monetary losses at the rate of \$100.00 per day from seizure, and their wrongful acts have prevented respondent from operating the vessel and thus have induced a foreclosure of a preferred mortgage with a consequent loss of respondent's ownership.

In the event the Court finds respondent obligated to libelants in personam it is fitting and proper to ascertain and fix respondent's losses and damages

and to set them off against any amounts due libelants.

Wherefore, having fully answered the libel, respondent prays that it be dismissed and that said vessel be released from monition and attachment and that he recover his costs herein incurred; further, in the event libelants are entitled to a personam judgment against respondent that he be adjudged to have a set off against libelants for all damages resulting for breach of contract and wrongful seizure of the vessel; further for such other relief as may be meet and equitable in the premises.

ANDERSON & COLLINS,
/s/ By LEONARD COLLINS,
Proctors for Respondent

Duly Verified.

Acknowledgment of Service attached.

EXHIBIT "A"

WORKING SHARE AND CONTRACT ON
TUNA CLIPPER SILVER SPRAY
OWNED AND OPERATED BY R. J.
TOBIN

This Agreement made and entered into this....
day of....., 1954, by and between R. J.
Tobin, hereinafter termed party of the first part,
and.....hereinafter termed party of the second
part, provides that

1. In consideration of the sum of \$. paid by the second party, the first party agrees to sell one working share in the fishing boat. owned by the first party.

2. The first party shall furnish all fuel, food, gear, and second party shall work under orders of first party or whomever the first party shall designate as Captain.

3. All boat movement and fishing operation shall be controlled by first party.

4. The location of the fishing operation shall be in southern waters or wherever designated by party of the first part.

5. The boat. shall carry. working shares to be divided as follows: one-half to the boat owner or party of the first part, and one-half to the crew who are shareholders.

6. In the event the party of the second part becomes dissatisfied with the working share he will give 30 days oral notice to party of the first part, which will enable first party to replace second party without hindering the operation of the boat.

7. In the event the second party desires to sell his share in the boat, the purchaser must be approved by the first party.

8. If the second party leaves or is dismissed from service, the first party will sell the working share for second party within 90 days of leaving the boat and give him full refund.

9. If the second party leaves the boat of his own free will and volition, he shall pay his own expenses to the point of departure, viz., Seattle.

10. If the second party proves unsatisfactory to the first party, the first party may terminate this agreement immediately, and the above conditions with regard to selling working shares shall then apply, provided, however, that if the first party terminates the agreement the first party shall pay the fare of the second party back to the point of departure, viz., Seattle.

11. In the event party of the first part shall decide to go out of business, the boat and equipment will be sold and shareholders paid off.

12. The party of the second part agrees to settle any difference with the first party and to arbitrarily do nothing whatsoever to hinder the operation of the boat and crew.

13. It is further understood that the first party is not responsible for life or limb of second party, and the second party thoroughly understands the hazards and risks of the venture.

14. This agreement by mutual consent of both parties may be made to apply to any other boat operated by first party insofar as he sees fit to adaptability of the second party.

15. In Witness Whereof the parties have caused

this agreement to be executed the day and year first
above written at.....

.....,

First Party

.....,

Second Party

[Endorsed]: Filed September 2, 1954.

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[Title of District Court and Cause.]

REPLY OF LIBELANT HARRY C. LOWER

To the Honorable the Judges of the Above Entitled
Court:

The reply of the libelant Harry C. Lower to the
answer of the respondent Robert J. Tobin on file
in this case alleges:

I.

Admits that libelant signed a purported working
share and contract prepared by the said respondent,
at Spokane, Washington, on April 17, 1954. Except
as thus admitted, libelant denies the allegations of
paragraph II.

II.

At the time referred to above, libelant had never
served on a commercial fishing vessel, and had no
experience with or knowledge about commercial
fishing. On the same date, respondent represented
to libelant that he was the owner of an 80 foot tuna
fishing vessel called the Silver Spray; that said

vessel was equipped to fish for tuna, and that a crew was already employed on shares, except for one vacancy; that respondent had had previous experience in commercial fishing as owner and operator of two vessels; that respondent had entered into a contract with Van Camp Sea Food Co., Inc., to fish for tuna out of San Diego, California, for the 1954 season, using the said vessel Silver Spray; that respondent then planned and was prepared to take the vessel south to San Diego from Puget Sound by May 15, 1954, for the 1954 tuna fishing season. Said representations were made to libelant for the purpose of inducing him to sign the aforesaid agreement, and libelant agreed to work aboard the said vessel for a tenth of the catch by virtue thereof.

III.

The aforesaid representations by respondent were false, and were made by him with intent to deceive libelant so that the said writing prepared by respondent and then executed by libelant as aforesaid, and as alleged by respondent in answer to the libel, is null and void, and of no effect.

IV.

Further replying to said answer, libelant admits that he had had no fishing experience, and that no wages in specific sum were agreed to, but otherwise libelant has no knowledge or information sufficient to form a belief as to the truth of the matters alleged in paragraph III, and therefore denies the same.

V.

Libelant denies the allegations of paragraph IV of said answer.

Wherefore, libelant prays that the affirmative defenses alleged by respondent be denied, and that he have a decree as prayed for in his libel.

/s/ BOGLE, BOGLE & GATES,

/s/ CLAUDE E. WAKEFIELD,

/s/ M. BAYARD CRUTCHER,

Proctors for Libelant

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed September 8, 1954.

[Title of District Court and Cause.]

REPLY OF INTERVENING LIBELANT
NORMAN BUNKER

To the Honorable The Judges of the Above Entitled
Court:

The reply of intervening libelant Norman Bunker to the affirmative defenses set forth in the Answer of respondent Tobin on file in this cause, alleges:

I.

Admits that intervening libelant signed a purported working share and contract prepared by said respondent at Seattle, Washington, on June 2, 1954, and denies all remaining allegations of respondent's First Affirmative Defense.

II.

That intervening libelant had never served on a commercial fishing vessel, but held an unlimited master's license and had considerable deep water experience as a merchant mariner but no experience with, or knowledge about commercial fishing. That on June 2, 1954 and prior thereto, respondent represented to intervening libelant that he was the sole owner of a tuna fishing vessel called, "Silver Spray;" that said vessel was equipped to fish for tuna and that respondent had ample funds to successfully provide and maintain the venture and that a crew was already employed on shares, including an experienced bait man and an experienced refrigerator man, two positions most important to the venture; that there was one vacancy on the crew, which vacancy was represented to be that of navigator; that intervening libelant was qualified to navigate said vessel. That respondent had entered into a contract with Van Camp Sea Food Co., Inc., to fish for tuna south of San Diego, California for the 1954 season using said vessel "Silver Spray." That said fishing company would operate a helicopter to assist in locating tuna fish; that respondent then planned and was prepared to take the vessel south to San Diego, leaving from Puget Sound on June 11 or 12, 1954, for the 1954 tuna fishing season. That said representations were made to intervening libelant for the purpose of inducing him to sign the aforesaid agreement, and intervening libelant agreed to work aboard said vessel for a tenth of the catch by virtue thereof.

III.

That the aforesaid representations by respondent were false, and were made by him with intent to deceive intervening libelant, so that said writing prepared by respondent and executed by intervening libelant as aforesaid and alleged by respondent in his Answer herein, is null and void and of no effect.

IV.

That intervening libelant admits that he had no fishing experience, and that no wage in specific sum was agreed to, but otherwise intervening libelant specifically denies all other matters alleged in respondent's Second Affirmative Defense.

V.

That intervening libelant denies each and every allegation contained in respondent's Third Affirmative Defense and the whole thereof.

Wherefore, intervening libelant prays that the affirmative defenses as alleged by respondent be denied, and that he have a decree as prayed for in his intervening libel herein.

/s/ ROBERT C. WELLS,

Proctor for Intervening Libelant
Bunker.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed September 10, 1954.

[Title of District Court and Cause.]

REPLY OF INTERVENING LIBELANT
GEORGE S. HERNING

To the Honorable the Judges of the Above Entitled
Court:

The reply of the intervening libelant George S. Herning to the answer of the respondent Robert J. Tobin on file in this cause alleges:

I.

The intervening libelant George S. Herning admits that he signed a purported working share contract prepared by said respondent on the 27th day of April, 1954, but denies each and every other allegation contained in paragraph 1 of the answer.

II.

The intervening libelant George S. Herning denies each and every allegation contained in the first affirmative defense of the respondent Robert J. Tobin and particularly denies that he has violated the alleged contract in any manner whatsoever.

III.

The intervening libelant further denies the second affirmative defense of the respondent Robert J. Tobin and particularly denies that he had had no fishing or sailing experience whatsoever but on the contrary alleges that he had fished previously for salmon in Alaskan waters and that he had experi-

ence as an engineer aboard fishing vessels and had so served. The intervening libelant further alleges that after he went aboard the SS Silver Spray he was assigned to engineering duties and did so perform aboard the SS Silver Spray as alleged in the intervening libel on file herein.

IV.

The intervening libelant George S. Herning further denies each and every allegation set forth in the third affirmative defense of the respondent Robert J. Tobin and particularly denies that he has caused the respondent to suffer damages at the rate of \$100.00 per day or any other sum whatsoever.

V.

The intervening libelant denies each and every other allegation contained in the answer and affirmative defenses of the respondent Tobin which he has not specifically denied hereinabove.

Wherefore, intervening libelant prays that the affirmative defenses alleged by the respondent be denied, that he have a decree as prayed for in his intervening libel.

/s/ ROBERT B. ALLISON,
Proctor for Intervening Libelant
George S. Herning.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed September 13, 1954.

[Title of District Court and Cause.]

REPLY OF INTERVENING LIBELANTS
EDGAR L. PEECHER AND WILLIAM E.
BARQUIST.

To the Honorable Judges of the Above Entitled
Court:

The reply of the intervening libelant, Edgar L. Peecher to the answer and affirmative defense of the respondent, Robert J. Tobin, on file in this case, alleges:

I.

Edgar L. Peecher admits that he signed a purporting working share and contract prepared by the said respondent at Seattle, Washington on May 4, 1954. Except as thus admitted, this libelant denies the allegations of respondent's first affirmative defense.

II.

At the time referred to above, Edgar L. Peecher had never served on a commercial fishing vessel and had no experience with or knowledge about commercial fishing and so informed the respondent, Robert J. Tobin. The respondent, Robert J. Tobin, represented to this intervening libelant that he was the owner of an 80 foot tuna clipper called the "Silver Spray"; that the said vessel was to be equipped or was equipped for clipper tuna fishing, and that in the crew which was already employed there were two experienced tuna fishermen plus the experience of the respondent, Tobin, of three years' fishing experience in Alaska; that the vessel had

been chartered with Van Camp Sea Food Co., Inc. to fish for tuna out of San Diego, California for the 1954 season, to arrive in San Diego, California not later than June 1, 1954. That as a result of the said representations, this intervening libelant was induced to quit his job at the Pacific Car & Foundry Co., Renton, Washington at the salary of \$92.00 a week, and to advance to the respondent, Robert J. Tobin, the sum of \$2,500.00 for a working share on the said "Silver Spray" in return for a one-tenth of the catch of the vessel.

III.

That the aforesaid representations by the respondent were false and were made by him with the intent to deceive intervening libelant, and said writing prepared by the respondent and then executed by this intervening libelant, as aforesaid, and as alleged by respondent in the Answer to the libel, is null and void and of no effect.

IV.

Further replying to said answer and affirmative defense, this intervening libelant admits that he had no fishing experience and that no wages in specific sum were agreed to, and all other matters contained in said respondent's second affirmative defense are specifically denied.

V.

This intervening libelant denies each and every

allegation, matter and thing contained in respondent's third affirmative defense.

The reply of intervening libelant, William E. Barquist, to the affirmative defenses set forth in the answer of the respondent, Tobin, on file in this cause, alleges:

I.

Admits that said intervening libelant signed a purported working share and contract prepared by the respondent at Seattle, Washington on May 4, 1954 and denies all other allegations in said respondent's first affirmative defense.

II.

This intervening libelant had no previous experience on a commercial fishing vessel nor knowledge about such vessel. Respondent represented to this intervening libelant that he was the owner of an 80 foot tuna clipper fishing vessel called the "Silver Spray" and that said vessel was equipped for tuna clipper fishing for tuna, or would be so equipped on its arrival in California, and that the said vessel was to leave for San Diego, California on May 15, 1954 to arrive not later than June 1, 1954 to fulfill contract with Van Camp Sea Food Co., Inc. to fish for tuna out of San Diego, California for the 1954 season.

III.

That the aforesaid representations by the respondent were false and were made with the intent

to deceive this intervening libelant so that said writing prepared by the respondent and executed by this intervening libelant, as alleged by the respondent in answer to the libel, is null and void and of no effect.

IV.

Further replying to said answer and affirmative defense, this intervening libelant admits that he had no fishing experience and that no wages in specific sum were agreed to, but that otherwise this intervening libelant has no knowledge or information sufficient to form a belief as to the truth of the matters alleged in paragraph III or the second affirmative defense, and therefore denies the same.

V.

This intervening libelant denies the allegations of the third affirmative defense.

Wherefore, the intervening libelants herein pray that the affirmative defenses alleged by the respondent be denied and that they have a decree as prayed for by their libel.

/s/ LEWIS S. ARMSTRONG,
Proctor for Intervening Libelants Edgar L. Peecher and William E. Barquist.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed September 14, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Cause having come on regularly for trial on the 14th day of September, 1954, and the said trial having been continued from day to day and concluded on the 17th day of September, 1954, all of the parties being represented by their proctors of record, and the Court having duly considered the testimony of the witnesses and the exhibits admitted in evidence, and having duly considered the briefs and arguments of counsel, and being fully advised in the premises, does now make the following

Findings of Fact.

I.

That on or about April 28, 1954, the respondent Robert F. Tobin purchased the respondent oil screw vessel Silver Spray, Official Number 250,538, her engines, tackle, apparel, furniture and equipment. At all times material since that date, said respondent has been and still is the owner and operator of said vessel.

II.

That the said respondent oil screw vessel Silver Spray was duly and regularly attached by the United States Marshal pursuant to the process of this Court, in this cause, on June 10, 1954, in waters within the Port of Seattle, Washington, within this District and within the jurisdiction of this Court.

That the said respondent, Robert F. Tobin, duly appeared in this cause and made claim to said vessel, as it owner, on July 26, 1954.

III.

That on or about April 17, 1954, the said respondent, Robert F. Tobin, entered into a contract of employment with the libelant, Harry C. Lower, the said libelant agreeing to work aboard the said vessel equipped as a fresh bait and refrigerated tuna clipper operating from southern California during the 1954 tuna fishing season, in return for one-tenth of the season's catch.

IV.

That on or about April 21, 1954, the said Harry C. Lower commenced working on board said vessel at the Port of Seattle, Washington, and thereafter continued to serve on board said vessel as a member of its crew until discharged as hereinafter related.

V.

That on or about April 22, the said respondent, Robert F. Tobin, entered into a contract of employment with the intervening libelant George S. Herning, the said intervening libelant agreeing to work aboard the said vessel equipped as a fresh bait and refrigerated tuna clipper operating from southern California during the 1954 tuna fishing season, in return for one-tenth of the season's catch.

VI.

That on or about April 27, 1954, the said George

S. Herning commenced working on board said vessel at the Port of Seattle, and thereafter continued to serve on board said vessel as assistant engineer and as a member of its crew until discharged as hereinafter related.

VII.

That on or about April 30, 1954, the said respondent Robert F. Tobin entered into a contract of employment with the intervening libelant Edgar L. Peecher, the said intervening libelant agreeing to work aboard the said vessel equipped as a fresh bait and refrigerated tuna clipper operating from southern California during the 1954 tuna fishing season, in return for one-tenth of the season's catch.

VIII.

That on or about May 1, 1954, the said Edgar L. Peecher commenced working on board said vessel at the Port of Seattle, and thereafter continued to serve on board said vessel as a member of its crew until relieved by the said respondent of his duties at the Port of Ketchikan, Alaska, on or about May 24, 1954. That the said Edgar L. Peecher thereafter reported for work aboard said vessel on or about June 4, 1954, and remained aboard said vessel as a member of its crew until discharged as hereinafter related.

IX.

That on or about May 11, 1954, the said respondent Robert F. Tobin entered into a contract of employment with the intervening libelant William E. Barquist, the said intervening libelant agreeing

to work aboard the said vessel equipped as a fresh bait and refrigerated tuna clipper operating from southern California during the 1954 tuna fishing season, in return for one-tenth of the season's catch.

X.

That on or about the same date the said William E. Barquist commenced working on board said vessel at the Port of Seattle, and thereafter continued to serve on board said vessel as a member of its crew until discharged as hereinafter related.

XI.

That on or about June 2, 1954, the said respondent Robert F. Tobin entered into a contract of employment with the intervening libelant Norman L. Bunker, the said intervening libelant agreeing to work aboard the said vessel equipped as a fresh bait and refrigerated tuna clipper operating from southern California during the 1954 tuna fishing season, in return for one-tenth of the season's catch.

XII.

That on June 3, 1954, the said Norman L. Bunker reported on board said vessel for work at the Port of Seattle, and performed duties thereon in preparation for the navigation of said vessel on its intended voyage. That the said intervening libelant was then advised by respondent's agent that he would be called when needed, and that the said Norman L. Bunker thereafter remained in the serv-

ice of said vessel as a member of its crew until discharged as hereinafter related.

XIII.

That on or about April 28, 1954, the intervening libelant John Kadlec commenced working on board the said vessel at the Port of Seattle as a member of its crew, for an agreed wage of \$100 per week. That the said intervening libelant thereafter continued to serve on board said vessel as a member of its crew until on or about June 3, 1954.

XIV.

That the said intervening libelant John Kadlec became and is entitled to wages of \$500.00 for the services aforesaid, no part of which sum has been paid to him except \$5.00.

XV.

That on June 7, 1954, and at all times subsequent thereto and following their respective employments, the aforesaid libelant and intervening libelants, excepting John Kadlec, were ready, able and willing to continue to perform their respective contracts of employment aboard the said vessel Silver Spray, as above described. That nevertheless, the respondent Robert F. Tobin on or before said date abandoned his contracts with said persons, and abandoned the tuna fishing voyage for the 1954 tuna fishing season, as above described, and thereby wrongfully discharged said libelant and intervening libelants.

XVI.

That the abandonment of the said contract of employment and of the said voyage by the respondent Robert F. Tobin, the owner and operator of said vessel, was through no fault of the said libelant or intervening libelants.

XVII.

That on June 7, 1954, the libelant Lower and the said intervening libelants Herning, Peecher, Barquist and Bunker became entitled to and then had valid causes of action against the said oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, and against the respondent Robert F. Tobin, for damages to the extent of the value of the share of each of said libelant crew members in and to the prospective tuna fish catch of the said vessel Silver Spray, as a tuna clipper equipped for fresh bait and refrigeration, for the 1954 season.

XVIII.

That the said causes of action above mentioned are the causes of action sued upon in this proceeding.

XIX.

That the said libelant and intervening libelant crew members may also have had causes of action against the respondent Robert F. Tobin at common law for fraud and deceit, or on some other cause of action at law. That they were nevertheless not required to sue the said respondent on any such theory, and did not do so in this proceeding.

XX.

That the value of each of said shares referred to in finding number XV was and is the sum of \$7,500.00, for which amount each of said libelant and intervening libelants Harry C. Lower, George S. Herning, Edgar L. Peecher, William E. Barquist and Norman L. Bunker has a maritime lien against the said oil screw vessel *Silver Spray*, her engines, tackle, apparel, furniture and equipment, and a right of action in personam against the respondent, Robert F. Tobin.

XXI.

That the nature and rank of the liens of the said libelant and intervening libelant crew members were and are for seaman's wages, and that the same are superior and prior to the maritime lien of the preferred ship mortgage lien hereinafter referred to.

XXII.

That from said shares above mentioned should be deducted the respective earnings of the said libelant and intervening libelants to the date of trial, and their prospective earnings to the end of the tuna fishing season, to-wit, on or about October 15, 1954. That there should be deducted from the share of the libelant, Harry C. Lower, the sum of \$875.00.

That there should be deducted from the share of the intervening libelant George S. Herning the sum of \$450.00.

That there should be deducted from the share of

the intervening libelant Edgar L. Peecher the sum of \$100.00.

That there should be deducted from the share of the intervening libelant William E. Barquist the sum of \$998.00.

That there should be deducted from the share of the intervening libelant Norman L. Bunker the sum of \$180.00.

XXIII.

That on April 28, 1954, the said respondent, Robert F. Tobin, executed and delivered to Fred I. Putnam and James A. Overman, additional intervening libelants, his promissory note in the sum of \$30,000.00, which sum he promised to pay in two installments each year in the amounts of \$2,500.00 each, including interest at the rate of five (5%) per cent per annum. Said promissory note provided that the first of said installments should be paid on September 1, 1954, and that if the same were not paid the whole sum of principal and interest should become immediately due and collectible at the option of the holder thereof. Said promissory note further provided that in case suit or action be instituted to collect the same, or any portion thereof, the respondent should pay such additional sum as the Court might adjudge reasonable as attorney's fees in said suit or action.

XXIV.

That to secure the payment of the principal and interest of said promissory note above referred to, the said respondent executed and delivered to the

said additional intervening libelants, as mortgagees, a preferred ship mortgage dated April 28, 1954, by the terms of which the said respondent mortgaged to the said additional intervening libelants the whole of the said oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, said mortgage providing that if respondent should fail to perform the covenants and promises in said promissory note and in said mortgage, then the said mortgage should be in default.

XXV.

That the said preferred ship mortgage was thereafter duly filed for record in the office of the Collector of Customs at the Port of Seattle, Washington, and was duly recorded by him, on April 28, 1954, in accordance with the provisions of Section 30, Subsection "C" of the Ship Mortgage Act of June 5, 1920. That the said mortgage was endorsed upon the document of the said vessel in accordance with the provisions of said Act, and that all of the acts required to be done by said Act in order to give to the said mortgage status of a preferred ship mortgage were duly done or caused to be done, either by mortgagees or by the said Collector of Customs.

XXVI.

That the said respondent has failed to pay the first installment due under the terms of the aforesaid promissory note, and is in default, and that there is now due and owing to the said additional intervening libelants, Fred I. Putnam and James

A. Overman, the principal sum of \$30,000.00, together with interest thereon in the sum of \$750.00, and the said additional intervening libelant's costs and disbursements herein to be taxed.

XXVII.

That in addition thereto the said additional intervening libelants are entitled to recover a reasonable attorney's fee, as provided for by the terms of the aforesaid promissory note, which the Court finds to be and fixes in the amount of \$2,500.00.

XXVIII.

That the said additional intervening libelants have a preferred ship mortgage lien against the respondent vessel for the sums aforesaid, and that said lien is secondary to the liens of the libelant and intervening libelant crew members.

XXIX.

That the rights of action and the rights of libelant and the intervening libelant crew members to have the respondent oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, attached by the process of this Court arose not less than three days before said vessel was attached at the instance of the libelant. That the claim of the respondent Robert F. Tobin against libelant and against the said intervening libelants for damages in the nature of demurrage or detention, for wrongful attachment of said vessel, is not valid and should be denied.

Done in Open Court this 28th day of October, 1954.

/s/ JOHN C. BOWEN,

United States District Judge.

Based upon the foregoing findings of fact the Court now makes the following

Conclusions of Law

I.

That this proceeding is within the admiralty and maritime jurisdiction of the United States and within the jurisdiction of this Court sitting in admiralty.

II.

That the libelant, Harry C. Lower, is entitled to a decree herein against the respondent oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, and against the respondent Robert F. Tobin, in the sum of \$6,625.00, together with his costs and disbursements herein to be taxed.

III.

That the intervening libelant George S. Herning is entitled to a decree herein against the said respondent vessel, and against the said respondent Robert F. Tobin, in the sum of \$7,050.00, together with his costs and disbursements herein to be taxed.

IV.

That the intervening libelant Edgar L. Peecher is entitled to a decree herein against the said re-

spondent vessel, and against the said respondent Robert F. Tobin, in the sum of \$7,400.00, together with his costs and disbursements herein to be taxed.

V.

That the intervening libelant William E. Barquist is entitled to a decree herein against the said respondent vessel, and against the said respondent Robert F. Tobin, in the sum of \$6,502.00 together with his costs and disbursements herein to be taxed.

VI.

That the intervening libelant Norman L. Bunker is entitled to a decree herein against the said respondent vessel, and against the said respondent Robert F. Tobin, in the sum of \$7,320.00, together with his costs and disbursements herein to be taxed.

VII.

That the intervening libelant John Kadlec is entitled to a decree herein against the said respondent vessel, and against the said respondent Robert F. Tobin, in the sum of \$495.00, together with his costs and disbursements herein to be taxed.

VIII.

That the aforesaid libelant and intervening libelant crew members are entitled to have the said vessel, her engines, tackle, apparel, furniture and equipment, condemned and sold, and the proceeds of sale applied first to the payment of the said liens.

IX.

That the aforesaid maritime liens of the libelant Harry C. Lower and the intervening libelants George S. Herning, Edgar L. Peecher, William E. Barquist, Norman L. Bunker and John Kadlec against said vessel are superior in rank and prior to the maritime lien of the preferred ship mortgage of the additional intervening libelants, Fred I. Putnam and James A. Overman.

X.

That the additional intervening libelants, Fred I. Putnam and James A. Overman, mortgagees, are entitled to a decree herein against the respondent oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, in the sum of \$30,725.00, together with a reasonable attorney's fee in the sum of \$2,500.00, and their costs and disbursements herein to be taxed.

XI.

That the said lien of the additional intervening libelants, Fred I. Putnam and James A. Overman, against said vessel, is superior in rank and prior in time to any and all maritime liens against the said vessel saving those foreclosed by the above mentioned libelant Harry C. Lower and intervening libelants George S. Herning, Edgar L. Peecher, William E. Barquist, Norman L. Bunker and John Kadlec.

XII.

That the said additional intervening libelant

mortgagees are entitled to have the said vessel condemned and sold, and the proceeds of sale applied to the amount of their said claim, together with their attorney's fee and costs allowed herein, subject, however, to the full payment of the prior maritime liens in the amounts herein found due of the libelant and intervening libelant crew members, together with their costs and disbursements.

XIII.

That any deficiency remaining unpaid after applying the proceeds of sale of said respondent vessel to payment of the aforesaid claims in the order of rank above provided, the aforesaid libelant and intervening libelants and additional intervening libelants are entitled to recover of the respondent Robert F. Tobin, together with interest thereon from the date of the decree.

Done in Open Court this 28th day of October, 1954.

/s/ JOHN C. BOWEN,
United States District Judge.

Approved as to form and presented by:

/s/ M. BAYARD CRUTCHER,
Of Bogle, Bogle & Gates, Proctors for
Libelant.

/s/ LEWIS S. ARMSTRONG,
Proctor for Intervening Libelants Wil-
liam E. Barquist and Edgar L.
Peecher.

/s/ ROBERT B. ALLISON,
Proctor for Intervening Libelant
George S. Herning.

/s/ ROBERT C. WELLS,
Proctor for Intervening Libelant
Norman L. Bunker.

Acknowledgment of Service attached.

[Endorsed]: Lodged October 26, 1954.

[Endorsed]: Filed October 28, 1954.

In the United States District Court for the West-
ern District of Washington, Northern Division

In Admiralty—No. 16039

HARRY C. LOWER, Libelant,
vs.

THE Oil Screw Vessel SILVER SPRAY, etc.,
et al., Respondents,
JOHN KADLEC, et al., Intervening Libelants,
FRED I. PUTNAM and JAMES A. OVERMAN,
Additional Intervening Libelants.

DECREE

The above entitled cause having regularly come on for trial in the above entitled Court, before the undersigned Judge thereof, on September 14, 1954, said trial having thereafter been regularly continued from day to day and concluded on September 17, 1954, the libelant, Harry C. Lower, and the

intervening libelant John Kadlec being present in Court and represented by M. Bayard Crutcher, their proctor, and the intervening libelant George S. Herning being present in Court and represented by his proctor, Robert B. Allison, and the intervening libelants Edgar L. Peecher and William E. Barquist being present in Court and represented by their proctor, Lewis S. Armstrong, and the intervening libelant Norman L. Bunker being present in Court and represented by his proctor, Robert C. Wells, and the respondent and claimant to the respondent oil screw vessel Silver Spray, her engines, tackle, apparel, furniture, and equipment, Robert J. Tobin, being present in Court and represented by Leonard Collins, his proctor, and the additional intervening libelants Fred I. Putnam and James A. Overman being present in Court and represented by their proctor, Stephen V. Carey, and this Court having duly considered the evidence and exhibits submitted by the respective parties, and the briefs and arguments of counsel, and being fully advised in the premises, and having orally announced its decision herein and having entered its findings of fact and conclusions of law herein.

Now, Therefore, in accordance therewith, it is Ordered, Adjudged and Decreed that the libelant, Harry C. Lower, have and recover of the respondent vessel and of the respondent Robert J. Tobin the sum of \$6,625.00, together with his costs herein taxed in the sum of \$35.00, with interest on said total sum until paid; that the intervening libelant George S. Herning have and recover of the respond-

ent vessel and of the respondent Robert J. Tobin the sum of \$7,050.00, together with his costs herein taxed in the sum of \$30.40, with interest on said total sum until paid; that the intervening libelant Edgar L. Peecher have and recover of the respondent vessel and of the respondent Robert J. Tobin the sum of \$7,400.00, together with his costs herein taxed in the sum of \$20.00, with interest on the said total sum until paid; that the intervening libelant William E. Barquist have and recover of the respondent vessel and of the respondent Robert J. Tobin the sum of \$6,502.00, together with his costs herein taxed in the sum of \$0.00, with interest on the said total sum until paid; that the intervening libelant Norman L. Bunker have and recover of the respondent vessel and of the respondent Robert J. Tobin the sum of \$7,320.00, together with his costs herein taxed in the sum of \$20.00, with interest on the said total sum until paid; that the intervening libelant John Kadlec have and recover of the respondent vessel and of the respondent Robert J. Tobin the sum of \$495.00 together with his costs herein taxed in the sum of \$0.00, with interest on the said total sum until paid; and that the liens of the aforesaid libelant and intervening libelants are equal and superior in rank to that of the preferred ship mortgage foreclosed herein; and it is

Further Ordered Adjudged and Decreed that the preferred ship mortgage upon the respondent vessel be and the same is hereby foreclosed, and that the mortgagees, the additional intervening libelants Fred I. Putnam and James A. Overman, have and

recover of the respondent vessel and of the respondent Robert J. Tobin the sum of \$33,225.00, together with their costs herein taxed in the sum of \$28.20, with interest on said total sum (excepting the amount of \$725.00) until paid; and that the lien of the aforesaid additional intervening libelants Putnam and Overman is superior and prior to any other maritime liens whatsoever against said vessel, save those for costs and for the awards to the libellant and intervening libelants above provided for; and said vessel "Silver Spray", her engines, tackle, apparel, furniture and equipment are hereby condemned and ordered sold by the Marshal to the highest and best bidder for cash and that the proceeds of such sale be applied to the payment of the foregoing awards to said libelants and intervening libelants and said Putnam and Overman and to said costs and accruing costs; and it is

Further Ordered, Adjudged and Decreed that any other persons having or claiming any interest whatsoever in said vessel be and the same are hereby foreclosed and forever barred from asserting the same; and it is

Further Ordered, Adjudged and Decreed that the Clerk of this Court issue a writ of venditioni exponas to Marshal of this District, for the sale of said vessel on board thereof, returnable on the 15th day of November, 1954, the Marshal giving six (6) days notice of sale pursuant to law, and it is

Further Ordered, Adjudged and Decreed that out of the proceeds of the sale of the said oil screw vessel Silver Spray, when paid into the registry

of the Court, the Clerk of this Court take such lawful fees and costs, including moorage and insurance premiums in lieu of ship's keepers and such other costs as may be due to him and to the United States Marshal, and then pay to the libelant Harry C. Lower, or his proctor, and to the intervening libelants George S. Herning, Edgar L. Peecher, William E. Barquist, Norman L. Bunker and John Kadlec, or their proctors, the respective amounts herein adjudged due to each of them, prorata, and it is further

Ordered, Adjudged and Decreed that if any part of the proceeds of sale of said vessel then remains in the registry of the Court, that the same be paid by the Clerk to the additional intervening libelants Fred I. Putnam and James A. Overman, or their proctor, in the amount herein adjudged due to them; and it is

Further Ordered, Adjudged and Decreed that if there be any residue in the registry of the Court after the payment of the proceeds as above directed, the same be paid to the respondent Robert J. Tobin, or his proctor, and it is

Further Ordered, Adjudged and Decreed that for any deficiency of the proceeds of the sale of said vessel to satisfy the amounts adjudged due to the libelant and respective intervening libelants and additional intervening libelants as aforesaid, the said libelant and respective intervening libelants and additional intervening libelants shall have execution against the respondent and his stipulators for costs,

their goods, chattels and lands, forthwith to satisfy this decree.

Done in Open Court this 28th day of October, 1954.

/s/ JOHN C. BOWEN,
United States District Judge

Approved and presented by:

/s/ BAYARD CRUTCHER,
Of Proctors for Libelant Harry C. Lower
and Intervening Libelant John Kadlee

/s/ LEWIS S. ARMSTRONG,
Proctor for Intervening Libelants Edgar
L. Peecher and William E. Barquist.

/s/ ROBERT B. ALLISON,
Proctor for George S. Herning.

/s/ ROBERT C. WELLS,
Proctor for Intervening Libelant Norman
L. Bunker.

Acknowledgment of Service attached.

[Endorsed]: Lodged October 26, 1954.

[Endorsed]: Filed October 28, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Libelant, Harry C. Lower and Intervening Libelant, John Kadlec and Bogle, Bogle & Gates, their proctors; Intervening Libelants, George S. Herning, Edgar L. Peecher, William E. Barquist and Robert B. Allison and Lewis S. Armstrong, their proctors; Intervening Libelant, Norman L. Bunker and Robert C. Wells, his proctor; and

To: The Clerk of the Above Entitled Court:

You, and each of you, will please take notice that Fred I. Putnam and James A. Overman, Additional Intervening Libelants, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Decree in favor of libelant and intervening libelants above named entered in the above cause on the 28th day of October, 1954, for the reasons specified in their Assignments of Error filed herein, true copies of which are herewith served upon your proctors of record.

Dated this 26th day of November, 1954.

/s/ FRED I. PUTNAM

/s/ JAMES A. OVERMAN

Acknowledgment of Service attached.

[Endorsed]: Filed November 29, 1954.

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

The appellants Fred I. Putnam and James A. Overman, hereby assign error in the proceedings, decrees, orders and decisions of the District Court in the above entitled cause as follows:

1. The court erred in failing to find and decree that the preferred marine mortgage of appellants Putnam and Overman is a first, prior, and superior lien against the vessel Silver Spray, or its proceeds.

2. The court erred in finding and decreeing that libelant Lower and intervening Libelants Herning, Peecher, Barquist and Bunker, or either of them, have any lien whatsoever against the vessel, or any cause of action either in personam or rem enforceable in admiralty.

3. The court erred in finding and decreeing that said libelant and said intervening libelants proved any damages, and this error is assigned regardless of whether the libels were or were not properly instituted and prosecuted within the admiralty jurisdiction of the District Court.

4. The court erred in finding that said libelant and said intervening libelants were employees rather than fishermen expecting to operate fishing lay.

5. The court erred in finding that said libelant and said intervening libelants were ready, able and willing to continue to perform their fishing con-

tracts, and that they or either of them were wrongfully discharged by abandonment.

6. The court erred in finding and decreeing that on June 7, 1954 the said libelant and said intervening libelants had valid causes of action against the vessel for damages to the extent of the claimed value of the share of each of them in and to a speculative tuna fish catch.

7. The court erred in finding that the Silver Spray was constructed and equipped as a tuna clipper for fresh bait fishing and refrigeration.

8. The court erred in finding that said libelant and said intervening libelants had or have causes of action properly instituted in admiralty rather than common law actions for fraud and deceit or money had and received.

9. The court erred in finding and decreeing that said libelant and said intervening libelants are entitled to recover \$7,500.00 each or any amount whatever.

10. The court erred in failing to make specific findings on damages as required by Admiralty Rule 46½.

11. The court erred in finding and decreeing that said libelant and said intervening libelants are entitled to maritime liens for seamen's wages.

12. The court erred in decreeing that said libelant and said intervening libelants have superior maritime liens for prospective fishing shares on fish that were not caught.

13. The court erred in failing to find and decree that appellants Putnam and Overman are entitled

to a decree foreclosing their preferred ship mortgage as the first and only lien against the Silver Spray, and erred in failing to condemn said vessel and to order its sale to apply the proceeds to the payment of appellants' note and preferred marine mortgage.

14. The court erred in failing to find and decree that said libelant and said intervening libelants should be charged with all costs incurred.

15. The court erred in finding and decreeing that intervening libelant John Kadlec was hired by the owner Tobin to stand watches as a seaman on the shakedown cruise to Alaska; and further erred in finding and decreeing that John Kadlec is entitled to any recovery for wages for the reason that such a finding and adjudication is against the preponderance of credible evidence.

Dated this 26th day of November, 1954.

/s/ FRED I. PUTNAM

/s/ JAMES A. OVERMAN

Approved as to Form:

/s/ ANDERSON & COLLINS

/s/ LEONARD COLLINS

Acknowledgment of Service attached.

[Endorsed]: Filed November 29, 1954.

[Title of District Court and Cause.]

ORDER CONFIRMING SALE OF VESSEL

This Matter having regularly come on for hearing this day upon the motion of libelant, and it being shown to the satisfaction of the Court that by the final decree entered herein the respondent oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment were condemned and ordered sold on November 15, 1954, and that pursuant to said decree a writ of venditioni exponas was duly issued out of this Court to the United States Marshal for this District, and that pursuant to said decree and writ the said Marshal did on the 15th day of November, 1954, sell the said vessel and her engines, tackle, apparel, furniture and equipment at public sale, and that the high bid therefor at said sale was the sum of \$11,000.00, the buyer being Yukon River Fishermen's Cooperative Association, Inc., a corporation, and that said price has been paid into the Registry of the Court, and that no person has objected to said sale, now on motion of libelant, it is

Ordered that the sale of the oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment to Yukon River Fishermen's Cooperative Association, Inc., a corporation, by the United States Marshal for this District, for the sum of \$11,000.00, be and the same is hereby confirmed.

Done in Open Court this 29th day of November,
1954.

/s/ JOHN C. BOWEN,
Judge

Presented and Approved as to Form:

/s/ M. BAYARD CRUTCHER

[Endorsed]: Filed November 29, 1954.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Whereas, the Appellants, Fred I. Putnam and James A. Overman have filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit to reverse, modify and the decree entered by the District Court of the United States for the Western District of Washington, Northern Division, in the above-entitled cause on October 28, 1954, and to supersede said final decree; and

Whereas, the said Appellants are required to give an undertaking, under seal, in the sum of \$2,000.00 conditioned for the satisfaction of the use and detention of the proceeds of the sale of the Silver Spray including interest and costs, if for any reason the appeal is dismissed or if the decree is affirmed, and to satisfy in full such costs, interest and damages as the Appellate Court may adjudge and award.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, United Pacific

Insurance Company, a corporation organized and existing under the laws of the State of Washington, and duly licensed to transact a general surety business in the State of Washington, does hereby undertake and promise on the part of the Appellants that said Appellants will comply with the conditions as above set forth, and does further agree that upon default by the said Appellants in any of the conditions hereof, the damages and costs, not exceeding the sum aforesaid, may be ascertained in such manner as this Court shall direct; that this Court may give judgment hereon in favor of any person thereby aggrieved against it for the damages and costs suffered or sustained by such aggrieved party, and that said judgment may be rendered in the above-entitled cause or proceeding against it.

/s/ FRED I. PUTNAM

/s/ JAMES A. OVERMAN

[Seal] UNITED PACIFIC INSURANCE
COMPANY,

/s/ By J. A. HODSON,
Attorney-in-Fact

Approved this 29th day of November, 1954.

/s/ JOHN C. BOWEN,
Judge.

Approved as to form:

ANDERSON & COLLINS
By LEONARD COLLINS
Proctors for Tobin.

Acknowledgment of Service attached.

[Endorsed]: Filed November 29, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED UPON BY
APPELLANTS PUTNAM AND OVERMAN

To the Clerk of the above entitled Court, and to
Bogle, Bogle & Gates, proctors for Libelant
Harry C. Lower and Intervening Libelant John
Kadlec; Robert B. Allison and Lewis S. Arm-
strong, proctors for Intervening Libelants
Herning, Peecher, and Barquist; Robert C.
Wells, proctor for Intervening Libelant Bunk-
er; Anderson & Collins, proctors for Respond-
ent Robert J. Tobin:

Please Take Notice that appellants Putnam and
Overman hereby adopt their fifteen assignments of
error dated November 26, 1954 as their statement
of points on which they intend to rely on this
appeal.

Dated at Seattle, Washington, this 14th day of
January, 1955.

PEYSER, CARTANO, BOTZER &
CHAPMAN,

/s/ By ARTHUR H. BOTZER,

Proctors for Putnam and Overman

Acknowledgment of Service attached.

[Endorsed]: Filed January 18, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO APOSTLES
ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure, and Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and stipulation of counsel, I am transmitting herewith as the record on appeal from the Decree filed Oct. 28, 1954 to the United States Court of Appeals at San Francisco, the following original papers:

1. Libel, filed June 10, 1954.
45. Intervening Libel in Rem and in Personam (Putnam and Overman), filed August 25, 1954.
52. Answer and Affirmative Defenses of Respondent Tobin to Libel and Intervening Libels of Lower, Bunker, Herning, Peecher and Barquist, filed Sept. 2, 1954, together with exhibit attached.
57. Reply of Libelant Lower, filed Sept. 8, 1954.
77. Findings of Fact and Conclusions of Law, filed Oct. 28, 1954.
78. Decree, filed Oct. 28, 1954.
89. Notice of Appeal, filed Nov. 29, 1954.
90. Assignments of Error, filed Nov. 29, 1954.

93. Supersedeas Bond (\$2,000.00), (UP I Co), filed Nov. 29, 1954.

99. Statement of Points Relied upon by Appellants Putnam and Overman, filed Jan. 18, 1955.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellants for preparation of the record on appeal in this cause, to-wit: Filing fee, Notice of Appeal, \$5.00; and that said amount has been paid to me on behalf of the appellants.

Witness my hand and official seal this 4th day of February, 1955, at Seattle, Washington.

[Seal] MILLARD P. THOMAS,
 Clerk
/s/ By TRUMAN EGGER,
 Chief Deputy

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL APOSTLES ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure, and Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Cir-

cuit, and Designation of counsel, I am transmitting herewith as supplemental apostles on appeal in the above-entitled cause, the following original papers in the file of the cause, to-wit:

5. Monition and Attachment with Marshal's Return thereon, filed June 15, 1954.

15. Intervening Libel of John Kadlec, Doss R. Payne and Norman L. Bunker, filed July 26, 1954.

33. Intervening Libel of William E. Barquist and Edgar L. Peecher, filed Aug. 16, 1954.

35. Intervening Libel of George S. Herning, filed Aug. 16, 1954.

37. Order Authorizing Withdrawal of Proctor Robert C. Wells for John Kadlec, filed Aug. 16, 1954.

47. Monition and Attachment on Intervening Libel of Fred I. Putnam and James A. Overman, filed Aug. 30, 1954 with Marshal's Return thereon.

63. Reply of Intervening Libelant Norman Bunker, filed 9-10-54.

66. Reply of Intervening Libelant George S. Herning, filed 9-13-54.

67. Reply of Intervening Libelants Edgar L. Peecher and William E. Barquist, filed Sept. 14, 1954.

95. Order Confirming Sale of Vessel, filed Nov. 29, 1954.

100. Designation by Appellants of Additional Original Documents for Certification to U.S.C.A., filed March 28, 1955.

Witness my hand and official seal this 8th day of April, 1954, at Seattle, Washington.

[Seal]

MILLARD P. THOMAS,
Clerk

/s/ By TRUMAN EGGER,
Chief Deputy

In the United States District Court for the Western District of Washington, Northern Division

No. 16039

[Title of Cause.]

TRANSCRIPT OF PROCEEDINGS AT TRIAL

Seattle, Wash., Sept. 14, 1954, 2:00 o'clock, p.m.

Before: The Honorable John C. Bowen, District Judge. [1*]

Appearances:

M. Bayard Crutcher, of Bogle, Bogle & Gates, 603 Central Bldg., Seattle, Wash., appearing for and on behalf of libelant Harry C. Lower and intervening libelant John Kadlec.

Leonard Collins, of Anderson & Collins, 1114 Vance Bldg., Seattle, Wash., appearing for and on behalf of respondents The Oil Screw Silver Spray, her engines, etc., and Robert J. Tobin, and claimant Robert J. Tobin.

Robert C. Wells, 2703 Smith Tower, Seattle,

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

Wash., appearing for and on behalf of intervening libelant Norman L Bunker.

Lewis S. Armstrong, 760 Central Bldg., Seattle, Wash., appearing for and on behalf of intervening libelants William E. Barquist and Edgar L. Peecher.

Robert B. Allison, 400 Central Bldg., Seattle, Wash., appearing for and on behalf of intervening libelant George S. Herning.

Stephen V. Carey, 811 New World Life Bldg., [2] Seattle, Wash, appearing for and on behalf of additional intervening libelants Fred I. Putnam and James A. Overman.

(The above-entitled case is called for trial by the Court.)

(Upon oral motion of Mr. Wells, the libel of Doss R. Payne is dismissed by the Court.)

* * * * *

The Court: You may now call your first witness or otherwise proceed with your case [3] in chief.

Mr. Crutcher: Mr. Lower.

HARRY C. LOWER

called as a witness by and in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Crutcher): Will you please state your full name?

A. Harry Charles Lower.

Q. Where do you live?

A. Hermiston, Oregon, 835 Orchard Street.

(Testimony of Harry C. Lower.)

Q. Are you the libelant in this action?

A. Yes.

Q. How old are you?

A. Thirty-two years old.

Q. Married? A. Yes. [4]

* * * * *

Q. How long were you in the Navy?

A. Four and one-half years.

Q. Were you at sea any of that time?

A. About three and a half years at sea. [5]

* * * * *

Q. Now, when did you first hear of Mr. Tobin, the respondent in this action?

A. Along the first of April—about April 11th I believe.

* * * * *

A. (Continued) I read in the "Portland Oregonian" an ad, advertising—

Q. Well, as a result of that ad, did you get in touch with Mr. Tobin?

A. Yes. Mr. Tobin got in touch with me. He [6] called me April 17th.

* * * * *

Q. And where did you meet Mr. Tobin?

A. In his home.

Q. Now, at that time did Mr. Tobin say anything to you relating to a vessel called the Silver Spray?

A. Yes. He pulled out a picture—

Q. That is sufficient. What did he say to you with respect to that vessel as concerns ownership?

(Testimony of Harry C. Lower.)

A. He said: "This is my boat. I own the Silver Spray." [7]

* * * * *

Q. Did he say what type of a vessel?

A. Said it was a tuna clipper.

Q. And did he say anything to you as to the equipment aboard that vessel?

A. He said it was fully equipped except for bait tanks; that he had the poles; and there was a lot of gear over in the gear locker.

Q. Did he say anything to you with respect to the capacity of the vessel?

A. He said it was a 49 ton net hold, 70 ton gross, I believe it was.

Q. Did he say anything to you with reference to intended use of that vessel?

A. He said that he had a contract with Van Kamp's cannery in San Diego, California; that he was going to take the vessel down there for tuna fishing.

Q. Did he say what time he intended to depart?

A. Said he planned to depart about May 15th.

Q. Incidentally, at this time where was the vessel Silver Spray?

A. He said it was in the Port of Seattle.

Q. Did he offer you a position on that vessel?

A. He offered me a working share in the vessel.

Q. And did he say anything to you with reference to the officers and other crew members of the vessel, whether they had already been employed?

A. He said he had one share left. He had just

(Testimony of Harry C. Lower.)

that morning sold a share to a cook in a marine hospital, and he had one share left.

* * * * *

Q. Now, at that time, did he show you any literature from Van Kamp?

A. Not at that time, no.

Clerk: This will be Libelant's Exhibit [9] No. 1.

(Booklet marked Libelant's Exhibit No. 1 for identification.)

Q. (By Mr. Crutcher): Showing you a booklet which has been marked for identification as Libelant's Exhibit 1, Mr. Lower, do you recognize that booklet?

A. Yes. That is the booklet I received when I went aboard the vessel.

Q. When did Mr. Tobin give that to you?

A. Oh, a couple of days after I went aboard the Silver Spray.

Q. As a result of the conversation which you had in Spokane, did you agree to go aboard the Silver Spray? [10]

* * * * *

A. Yes, I went aboard about the 21st or 22nd.

Q. That is of April? A. April.

* * * * *

Q. Well, while you were still in Seattle what services did you perform aboard the Silver Spray?

A. Any work that was designated by the skipper, Mr. Tobin. I painted, cleaned up, helped the engineer, helped down in the engine room, general deck work.

(Testimony of Harry C. Lower.)

Q. Where were you living during that time?

A. Aboard the boat.

Q. Now, thereafter, did you sail aboard the Silver Spray? [11]

* * * * *

A. May 18th.

Q. And the vessel departed for where?

A. Ketchikan, Alaska.

Q. And while the vessel was sailing from here to Ketchikan, did you perform any services on board?

A. Yes. I stood helmsman's watch, and I stood watch with Mr. Gehrig learning navigation.

Q. Did you stand a regular watch?

A. Yes.

Q. Now, about when did the vessel arrive in Ketchikan?

A. May 21st, close to there.

* * * * *

Q. When you arrived at Ketchikan, what occurred?

A. We stayed there that day. Mr. Tobin along about five o'clock in the evening said that he received a call to go to Wrangell after a load of shrimp, and he wanted the boat to proceed to Wrangell to pick up a load of shrimp. [12]

Q. All right. Did you proceed with the vessel?

A. Yes.

Q. Did Mr. Tobin remain with the vessel?

A. No. He stayed in Ketchikan.

* * * * *

(Testimony of Harry C. Lower.)

Q. And how many crew members were there?

The Court: Read the question.

(Last question is read by the reporter.)

A. I think 11 or 12. I forget which. Well, there were 11 or 12 altogether. Crew members—there was——

Q. You could name them if it would be easier.

A. Herning——

Q. What duties was he performing?

A. Stan Herning was working in the engine room, assistant engineer. There was Helge—I don't know his last name, a Norwegian engineer.

The Court: Was he an engineer? [13]

Witness: Yes, licensed engineer.

Q. (By Mr. Crutcher): Would that be George Helwig? A. I believe that is it.

Peecher—he stood helmsman's watch. Bert Fontague, which was the cook.

* * * * *

A. (Continued) Bill Barquist.

Q. What did he do?

A. He stood helmsman's watch.

Don Moore. He was the navigator, skipper, to take us up there.

Q. And was Mr. Kadlec on board?

A. Yes, John Kadlec.

Q. What services did he perform, if you know?

A. He stood helmsman's watch.

Q. Was he in the engine room?

A. He worked in the engine room part of the time. [14]

(Testimony of Harry C. Lower.)

Q. Now, on the way up, did Mr. Tobin perform any services?

A. He stood watch with Don Moore, Mr. Moore.

Q. And was Mr. Payne on board?

A. Doss Payne? Yes.

Q. And what did Mr. Payne do?

A. He stood a watch, helmsman's watch.

Q. Where there any other people on board?

A. Mr. Jim Gehrig.

* * * * *

Q. You say he was navigator——

A. He was navigator on the off watch.

Q. Was there anybody else on board?

A. Dr. Trowbridge. [15]

* * * * *

Q. Now, at Ketchikan how many of these men got off?

A. Doss Payne, Dr. Trowbridge, Mr. Tobin, Mr. Gehrig.

* * * * *

Q. Now, you went on to Wrangell you said, and then what happened then? Where did you go from there?

A. We proceeded back to Ketchikan.

Q. And did you thereafter see Mr. Tobin?

A. When we got to Ketchikan I saw Mr. Tobin. I went up to the Stebbin Hotel Coffee Shop with him. [16]

* * * * *

Q. It would be May 24th then I believe, is that right?

A. May 24th.

(Testimony of Harry C. Lower.)

Q. Did you have a discussion with Mr. Tobin at that time? A. Yes. [17]

* * * * *

Q. Did Mr. Tobin at that time give you any instructions as to what was to be done with the vessel?

A. He said take the booms off, the jig booms, the booms for tuna; take them off of the boat.

Q. And did he state anything to you with reference to the use which was to be made of the vessel?

A. He said that it was going to be used here in Alaska for hauling cargo.

Q. At that time did he say anything to you with reference to tuna fishing? A. No.

Q. Did he say anything to you at that time about a hunting lodge?

A. Yes. He said they had a site picked out for a hunting lodge there in Alaska.

Q. Did he say anything about how the vessel would be used in connection with that?

A. To haul clients up there to the hunting lodge and supply the hunting lodge. [18]

* * * * *

Q. Now, do you know whether Mr. Tobin thereafter left the City of Ketchikan? A. Yes.

Q. When did he leave?

A. That same day.

Q. Did you have any other discussions with him before he left?

* * * * *

A. He said that he was leaving for Seattle to

(Testimony of Harry C. Lower.)

get money that was deposited in the bank here for the [19] shrimp that we didn't pick up, that he had money deposited here in the bank, here in Seattle, and I also give him the receipts at that time for the money that I spent in Wrangell for repairs to the Silver Spray.

Q. And at that time did he say anything with reference to returning to Ketchikan?

A. No, he did not.

Q. At that time did he say anything about plans for tuna fishing? A. No.

Q. Now, did you again see Mr. Tobin on that day before he left for Seattle? A. No.

Q. That is, before he left Ketchikan. Did you receive any money from Mr. Tobin?

A. Approximately \$80.00.

* * * * *

Q. Did he state the purpose of that money?

A. He said it should be used for ship's money.

Q. And at that time did Capt. Moore have any ship's money? A. No. [20]

* * * * *

Q. And did Capt. Moore at that time make any remark to you as to the use of the vessel?

A. He said: "It looks like we are going to use it for cargo work around Alaska." [21]

* * * * *

Q. Was anything done about employing the vessel for cargo work?

A. Don Moore went out and tried to find some cargo to haul around there.

(Testimony of Harry C. Lower.)

Q. Was there any work found? A. No.

Q. Did you make any inquiries yourself?

A. Yes. When I left Mr. Tobin's room with Don Moore, we had no credit in Ketchikan. He says: "We need some supplies."

Q. Well, now, that will suffice. You did make inquiries? A. Yes.

Q. As a result of those inquiries, did you learn whether there was work available at Ketchikan, whether or not there was work available?

A. No, there wasn't.

Q. Did you learn the fact——

A. I learned the fact that there was no work available.

Q. All right. Now, subsequent to that week during which you lay in Ketchikan, where did the vessel go?

A. Back to the port of Seattle.

Q. And at what time on what date did you arrive [22] back in Seattle?

A. Approximately June 3rd.

* * * * *

Q. Do you recall the approximate time of the day on which you arrived back at Seattle on June 3rd?

A. Approximately 5:30 in the morning.

Q. And on that day did you again make contact with Mr. Tobin? A. Yes. [23]

Q. Where?

A. The Edmond Meany Hotel.

Q. Did you see him there? A. Yes.

(Testimony of Harry C. Lower.)

Q. Now, at that time was any one else present?

A. Don Moore.

Q. And at that time did you have any conversation relative to the ship's money which you had received?

A. No.

Q. At that time did you have any discussion about tuna fishing?

A. No.

Q. Had you met Mr. Gehrig prior to this time?

A. Yes.

Q. Had Mr. Tobin introduced Mr. Gehrig to you? [24]

* * * * *

A. Yes, he said Mr. Gehrig was his business agent.

Q. And did he say that with reference to any particular subject or transaction?

A. He will handle his business here in Seattle.

Q. Now, after talking to Tobin, did you talk with Mr. Gehrig?

A. Yes.

Q. What day was this?

A. The next day.

Q. That would be June 4?

A. June 4 of this year.

Q. And at that time when did you and where did you talk with Mr. Gehrig?

A. Aboard the Silver Spray.

Q. At that time where was Mr. Tobin, if you know?

A. I believe he was in Spokane.

Q. Did you discuss with Mr. Gehrig the use of the vessel?

A. Yes.

(Testimony of Harry C. Lower.)

Q. What was the object or subject of that conversation if you recall?

A. Mr. Gehrig said: "We are going to have to salvage something out of this. We are going to have to [25] put the vessel to work to get our money back and get some money out of it." He suggested we incorporate.

Q. Did Mr. Gehrig say anything to you about tuna fishing? A. No.

Q. After you arrived back at Seattle on June 3, was any work undertaken on the vessel to outfit it for fishing? A. No.

Q. Now, were you aboard on June 5?

A. No.

Q. Were you aboard on June 4?

A. Part of the day. I left in the evening.

Q. Who was on board still at that time?

A. There was Skipper Don Moore and the rest of the men, and the engineer, George Helwig or whatever, and the crew members came and went that day.

Q. How was the food on board so far as the supply was concerned?

A. There was very little food.

Q. On the occasion of your conversation with Mr. Gehrig was any one else present?

A. Yes.

Q. Who else?

A. Ed Peecher, and I don't know whether John [26] Kadlec was there or not; I think he might have been for part of it.

(Testimony of Harry C. Lower.)

Q. When you said that Mr. Gehrig suggested you incorporate, to whom was he referring?

A. To the shareholders. * * * * * [27]

Q. Now, did you make any subsequent efforts or did Mr. Lower make any subsequent efforts in your presence to get in touch with Mr. Tobin?

A. Yes.

Q. And on what day was that?

A. That is on June 5.

Q. That would be a Saturday, would it not?

A. Yes.

Q. And were you able to get in touch with him?

A. No.

Q. Did you make any effort to get in touch with Mr. Gehrig? A. Yes.

Q. And did you talk with Mr. Gehrig?

A. Once that day, yes, I talked to him.

Q. What was the subject of that conversation?

A. I asked him if he had got in touch with Mr. Tobin and what Mr. Tobin said about returning the money that I had invested, the working share in the vessel. [29]

Q. And what did he say?

A. He said that he had been unable to get in touch with Mr. Tobin.

Q. Did he make any statement to you with reference to the return of the money?

A. He said: 'Give me a little time.'

Q. At that time did he say anything to you about proceeding, the vessel proceeding, South to fish for tuna? A. No.

(Testimony of Harry C. Lower.)

Q. And thereafter did you consult legal counsel as to what your rights or remedies might be?

A. Yes.

Q. And who was that counsel?

A. Bogle, Bogle & Gates and Mr. Crutcher. [30]

* * * * *

Q. Subsequent to June 6th, which was that Sunday, what did you do?

A. I returned to Hermiston.

Q. When did you remove your gear from the Silver Spray? A. On the 4th. [32]

* * * * *

Q. Incidentally, and referring back in your testimony, at the time that you first discussed this matter with Mr. Tobin in Spokane on April 17th, did he make any reference with regard to the length of the tuna fishing season?

A. He said it would run into October. [33]

Q. Commencing when? When was the vessel to depart from Seattle? A. May 15th.

* * * * *

Q. Now, at that time, did Mr. Tobin make any statement to you with reference to what you might reasonably expect to earn during the season?

A. He said that I could reasonably expect over \$5,000.00. He said he was telling all his men \$5,000.00.

Mr. Crutcher: I have no other questions.

The Court: You may cross examine on behalf of any opposing litigants.

(Testimony of Harry C. Lower.)

Cross Examination

Q. (By Mr. Collins): Mr. Lower, what is your present address?

A. 835 Orchard Street, Hermiston, Oregon.

Q. You entered into an arrangement with Mr. Tobin? A. Yes.

Mr. Collins: May I please submit this document, Your Honor? [34]

The Court: Yes, you may. Do you wish it marked for identification?

Mr. Collins: Yes, Your Honor.

The Clerk: Respondent's Exhibit A-1.

(Contract marked Respondent's Exhibit A-1 for identification.)

Q. (By Mr. Collins): You have a document before you marked for identification as Respondent's A-1. Is that the contract offered to you by Mr. Tobin? A. Yes.

Q. Did you sign that agreement?

A. Yes.

Q. Did your wife sign the agreement?

A. Yes.

Q. You studied that agreement over a period of two or three days, did you not? A. No.

Q. Did you not take that agreement home to have your wife look at it and read it?

A. No. My wife was there with me.

Q. Did you understand the terms of it?

A. As well as I could, yes. [35]

Q. You understood that it was a working share in the Silver Spray?

(Testimony of Harry C. Lower.)

A. That I was a crew member in the Silver Spray, working share.

Q. And at that time you gave Mr. Tobin \$2500.00 as your share? A. Right, yes, sir.

Q. Did you and Mr. Tobin discuss this agreement? A. Yes.

Q. Then you understood that he was to manage the voyage of the vessel?

A. He was to be the skipper.

Q. And he, in the use of his discretion, could direct the vessel's movements? A. Yes.

Q. You then understood that if you cared to leave the vessel you would give Mr. Tobin 30 days' notice? A. Yes.

Q. Did you give Mr. Tobin 30 days' notice?

A. Yes.

Q. Did you give Mr. Tobin 30 days' notice?

A. No.

Q. You also understood that Mr. Tobin had the option to release you if he wanted to?

A. Yes. [36]

Q. And in either event, whether you gave notice or he should release you, you agreed under this writing to give him 90 days' notice to sell your share? A. Yes.

Q. (Continued) —and give your money back?

A. Yes.

Q. And you also understood under this agreement that you would do nothing to hinder the operation of this vessel, right? A. Yes.

(Testimony of Harry C. Lower.)

Q. You say the vessel arrived back in Seattle on June 3rd and you went to see Mr. Crutcher?

A. Not on June 3rd, no.

Q. Pardon me. You are correct. I will change the question. You say the vessel arrived in Seattle on June 3rd and thereafter you saw Mr. Crutcher, the attorney? A. Yes.

Q. And through Mr. Crutcher you libeled this vessel? A. Yes. [37]

* * * * *

Q. Did Mr. Tobin give you any reason to believe the contract was not in force?

A. He didn't carry out to go tuna fishing.

Q. And you didn't carry out the terms of your separation from the vessel, did you?

* * * * *

A. I tried to get in touch with Mr. Tobin and I could not. [38]

* * * * *

Q. Did you not, with other crew members, meet with Tobin and discuss the Alaska trip?

A. I was a crew member. Of course we discussed it. We were crew members. Mr. Tobin directed us to go to Alaska.

Q. Was it with your permission and with your consent?

A. It was with my consent that he said he was going to Alaska and then return and go tuna fishing.

Q. Now, what was that cruise for?

A. He represented it as more or less a shake-down cruise. The shrimp money received from the

(Testimony of Harry C. Lower.)

shrimp would pay for it. There might be certain crew members that didn't work out that he didn't want to take with him on his fishing venture to Southern waters.

Q. You had no objection to the voyage as such, did you? A. No.

Q. Now, where is the first place you stopped in Alaska?

A. Stopped at Ketchikan, Alaska. [39]

Q. And that is where you say these men left the vessel, Payne, Trowbridge, Tobin, Gehrig?

A. Yes, sir.

Q. You didn't mention Peecher, but he left, too, didn't he? A. Yes, he did.

* * * * *

Q. Why did Mr. Peecher leave?

A. He couldn't stand the cold weather. His hands were crippled up and he wanted to return to the States.

Q. Then he left the vessel of his own volition, did he not? A. Yes.

Q. Peecher is one of the libelants in this [40] case, is he not? A. Yes.

Q. Tobin received a call from Seattle to return, did you so testify? A. No.

Q. Do you know why Tobin left?

A. He said he left to come down and pick up the money that was in the bank down here on deposit. * * * * *

Q. And you all consented to it, did you not?

A. We didn't have a chance to consent.

(Testimony of Harry C. Lower.)

Q. But you knew that when Tobin left the vessel he did so on Silver Spray business?

A. That is as far as I know, yes. [41]

* * * * *

Q. Now, isn't it true, Mr. Lower, that this entire trip was, as Mr. Tobin said, merely a shake-down cruise and an experiment to try out the vessel?

A. No. I don't think it was that at all. After we got up there and there was nothing, no shrimp there, nothing there—— [42]

* * * * *

Q. The Alaska trip was a good-natured one, was it not?

The Court: So far as relationship between whom?

Mr. Collins: Between all on board.

A. No, I wouldn't say that. Mr. Peecher didn't like it a bit that we were going to Alaska.

Q. Without any reflexion on any one on board, was there quite a bit of drinking and partying?

A. Quite a bit? How much do you mean by "quite a bit"?

Q. Well, I mean as might be normal among men on a trip of that kind. [43]

* * * * *

A. No. There was no excessive drinking.

Q. I didn't ask if there was excessive drinking, but then there was friendly drinking on the trip?

A. When the men got off watch, they might have taken a drink, yes. * * * * *

(Testimony of Harry C. Lower.)

Q. You say that from the time Tobin left the vessel in Ketchikan you heard nothing more concerning his intentions to tuna fish?

A. No. Yes. I never heard any more about tuna fishing. [44]

Mr. Collins: May I submit a document?

The Court: You may have it marked if that is what you wish.

The Clerk: Respondent's Exhibit A-2.

(Copy of telegram marked Respondent's Exhibit A-2 for identification.)

The Court: Do you intend to offer in connection with this witness's interrogation Respondent's Exhibit A-1?

Mr. Collins: Thank you, Your Honor. I offer A-1 in evidence, it having been identified.

Mr. Crutcher: At the same time I will offer Libelant's 1 in evidence, which I see I omitted.

The Court: Libelant's Exhibit 1 is admitted. Respondent's Exhibit A-1 is likewise admitted.

(Libelant's Exhibit No. 1 received in evidence.)

(Respondent's Exhibit A-1 received in evidence.) [45]

Q. (By Mr. Collins): Mr. Lower, you have before you a telegram. Did you not receive that telegram or the original of it?

The Court: It has been marked Respondent's Exhibit A-2.

Q. (Continued) You received the telegram from Mr. Tobin in Seattle, did you not?

(Testimony of Harry C. Lower.)

A. I did a day after it was sent.

* * * * *

Q. What does it say, sir?

The Court: Do you wish to offer it in evidence?

Mr. Collins: Yes. I offer A-2 in evidence.

The Court: It is now admitted.

(Respondent's Exhibit No. A-2 received in evidence.) [46]

* * * * *

Q. (By Mr. Collins): Thereupon you did return to Seattle? A. Yes.

Q. And you arrived here June 3, and you and Mr. Moore saw Tobin at the Edmond Meany Hotel?

A. Right, yes, sir.

Q. And you at that time, you and Mr. Tobin, in Capt. Moore's presence, discussed tuna prospects? A. Not that I remember, no.

Q. Would you say that you did not discuss tuna prospects?

A. No, that is right; we did not.

Q. I can't hear you too well.

A. We did not discuss tuna prospects.

Q. Well, what did you discuss?

A. Oh, he said that he was flying about getting another boat, and we were going to run both boats. He [47] didn't know—he might send the Silver Spray South, and he might send the other boat up to Alaska; he didn't know.

Q. Did it make any difference to you?

A. I—at that time I was so heartsick—I knew

(Testimony of Harry C. Lower.)

there was nothing more. Anything he said I couldn't believe.

Q. Then you made no demands that the Silver Spray go tuna fishing? A. No. [48]

* * * * *

Q. A moment ago you said you were disgusted about the whole thing. What did you mean by that?

A. Because we hadn't went tuna fishing. It looks like he wanted to run to Alaska all the time.

Q. There were various different ventures under consideration, were there not?

A. At what time was this?

Q. Well, didn't you gentlemen speak of the freight to Alaska or Mr. Tobin might have two or three boats running and some of you men might be on one and some on the other, some on the Silver Spray?

A. That is what he tried to present to us, yes.

Q. Well, you and Mr. Tobin and the other shareholders were experimenting in this field, were you not? A. No, no.

Q. Have you ever tuna fished? [49]

A. No.

Q. You admit that there was no wage agreement at any time?

A. There was the promise of money coming in.

Q. That is share money on the catch of fish?

A. Yes.

Q. Now, after you and Mr. Moore left the hotel you proceeded back to the vessel?

A. No. We went over to Jim Gehrig's house.

(Testimony of Harry C. Lower.)

Q. And then you went back to the vessel after that? A. Yes.

Q. And how long did you stay aboard?

A. Practically all day I believe.

Q. Did you have a meeting at that time with the other men?

A. Most of the men were gone home.

Q. When you came down through the Sound the vessel hit a log? A. Yes.

Q. And it had to be laid up as far as you knew for several days?

A. I didn't know what the extent of the damage was.

Q. But you knew it had to be laid up for repairs? [50] A. Yes.

* * * * *

Q. Were you not told before you docked that you and the other men could go ashore for several days, go home during the time the vessel was in drydock?

Mr. Crutcher: Object, Your Honor, unless he identifies the person who is telling him this.

The Court: The objection is sustained.

Q. (By Mr. Collins): Using the same question, were you not told so by Don Moore?

A. That I could go home for several days?

Q. That all of you men could go home for several days during drydocking?

A. I never heard him tell the rest of the men that they could go home. He might have told them—not [51] in my presence.

(Testimony of Harry C. Lower.)

Q. Did he tell you?

A. He said I had better stick around until he might take it over in drydock.

Q. But in any event, when the vessel docked what men left?

A. Mr. Kadlec, and Mr. Herning, and I don't know whether Mr. Barquist left that day or not.

Q. Did he leave either that day or the next day?

A. Yes.

Q. Well, of the shareholders then, who stayed on board——

A. Myself—and I don't know whether Bert Fontagnere has got a share or not.

Mr. Collins: I think it is understood that he was not.

Mr. Crutcher: The answers to the interrogatories state that he was a shareholder.

Mr. Collins: We will clarify that in a moment. For our purposes now, can we stipulate that he was not a shareholder? There is no use confusing the record. [52]

* * * * *

Witness: He was represented to me as a shareholder. I don't know whether he was or not.

* * * * *

Q. (By Mr. Collins): On what day did you have the meeting on board the vessel with Gehrig when you spoke of possibly——

A. That was the next day; that was the 4th. [53]

* * * * *

(Testimony of Harry C. Lower.)

Q. Do you know whether Tobin went to Spokane the evening of June 3?

A. Yes, he did.

Q. And when did you see him again?

A. I never saw him again.

Q. Were you not on board the vessel about one [54] or two days later when Tobin came out and tried to get aboard and you and other shareholders refused to let him aboard the ship?

* * * * *

A. No.

Q. You did go to Hermiston on the 6th?

A. Yes.

Q. You telephoned Tobin from Hermiston, did you not? A. No.

Q. Never called at all?

The Court: I think you ought to speak up, Mr. Lower, so all who are present can hear you, if possible. A. No.

Q. Well, now, will you tell me when and under [55] what circumstances and who was present when, as you claim, Tobin fired you?

A. When Tobin fired me?

Q. Yes.

A. There was no firing done.

* * * * *

Q. But your answer is that at no time did Tobin fire you? A. No.

Q. When you said that you were disgusted with the venture, actually didn't you have in mind that you wanted to terminate the venture and get your

(Testimony of Harry C. Lower.)

investment back, your investment of \$2500.00? [56]

* * * * *

A. Well, I wanted to give Mr. Tobin every opportunity in the world, and I was heartsick. I didn't know what to do. I honestly didn't know what to do, so I went and got legal counsel.

* * * * *

Q. You wanted your \$2500.00 back? Correct?

A. Yes.

Q. And isn't that the reason you saw counsel about bringing this suit? A. Yes.

Mr. Collins: That is all.

(Discussion.)

Cross Examination

* * * * * [57]

Q. (By Mr. Carey): You said that you answered or saw an ad in the paper on April 11, 1954. Where were you at that time?

A. I was in Hermiston, Oregon.

Q. And in what paper did you see it?

A. Portland Oregonian. * * * * * [59]

Q. At the time that you had these conversations in Spokane immediately following April 17th or on April 17th, they wholly concerned the proposed tuna fishing operation? A. Yes, sir.

Q. And that was the only thing that was discussed up to the time you signed the contract?

A. Yes.

Q. Nothing was said about any proposed freighting to and from Alaska? A. No, no.

(Testimony of Harry C. Lower.)

Q. At some time or other you put up \$2500.00?

A. The same night.

Q. That same night?

A. I signed the contract.

Q. And that was to buy in a share on a tuna fishing operation?

A. Working share on a tuna clipper.

Q. Had you ever had any tuna fishing experience of any kind? A. No, sir.

Q. Any kind of fishing experience?

A. Sport fishing is all, sir. [60]

* * * * *

Q. You departed for Alaska on May 18?

A. Yes, sir.

Q. What were you doing between April 23 and May 18? A. Working on the boat.

Q. For what purpose?

A. Getting it ready. I was painting and doing whatever work Mr. Tobin——

Q. And that was in propects for the proposed tuna operation? A. Yes.

Q. When did the matter come to your attention of a proposed trip to Alaska?

A. About two days before we left. He mentioned something about shrimp in Alaska. [61]

Q. That would be May 16th or thereabouts?

A. Yes.

Q. Did you object to that?

A. I was under his orders; I had to go.

Q. My question is: Did you object to that?

(Testimony of Harry C. Lower.)

A. Inside, yes, I mean, but not outwardly to him, no.

Q. As far as anybody could discern, outwardly you did not object to that? A. No.

Q. You had no contract, either written or oral, for any wages to and from Alaska?

A. No, sir. [62]

* * * * *

Q. Did you make any inquiry as to whether Mr. [63] Tobin was the sole owner or whether there were any obligations against the boat?

A. Mr. Tobin told me he was the sole owner of the boat, and he had a mortgage on the boat.

Q. And you think he misrepresented to you on that account?

A. The date I signed my contract, yes.

Q. And you put up \$2500.00 relying upon what he said? A. Yes.

Q. And you now think you have been deceived?

A. Well, he didn't—

Q. Do you now think you have been deceived?

A. In what way?

Q. I am inquiring of you. Do you now think that Tobin deceived you? A. Yes.

Q. And the purpose of your lawsuit is to try to get back your \$2500.00 that he deceived you of?

* * * * * [64]

A. The purpose of my lawsuit is to get back—I had a contract to go to Greenland which amounted to \$8,000.00, and the salmon—I mean the tuna for the summer which I have lost, all the time I have

(Testimony of Harry C. Lower.)

lost, and everything I have lost, I am trying to get compensation for it.

Q. (By Mr. Carey): You are trying to get damages because you claim Tobin deceived you, is that right? A. Yes. [65]

* * * * *

Q. These proposed operations in Alaska, hauling freight back and forth possibly, engaging another boat, operating a hunting lodge and hauling passengers back and forth in connection with the hunting lodge, were [66] those operations to be conducted before you went tuna fishing or after you got back? A. Well, he said right then.

Q. Pardon? A. Right then.

Q. Did you agree to that proposal?

A. I was heartsick. I didn't know what to do.

Q. I didn't ask you about your condition. I asked you if you agreed to it.

A. Well, I had to. I was a crew member. Yes, sir.

Q. You did agree to it? A. Yes. [67]

* * * * *

Q. And I will ask you the direct question. Are you now saying that in negotiating this contract with you [71] Tobin told you the truth or deceived you?

A. You mean the whole contract—is it wholly true or wholly false?

Q. At the time you negotiated this contract with Tobin on April 17th and you put up \$2500.00, are

(Testimony of Harry C. Lower.)

you now claiming that Tobin told you the truth or cheated you? A. Cheated me.

Mr. Carey: That is what I thought. That is all.
* * * * * [72]

(At 4:45 o'clock p.m., Tuesday, September 14, 1954, proceedings recessed until 10:00 o'clock a.m., Wednesday, September 15, 1954.)

Seattle, Wash., Sept. 15, 1954, 10 o'clock a.m.
* * * * * [73]

Cross Examination—(Continued)

Q. (By Mr. Collins): Now, then, when did you talk to Mr. Crutcher?

A. When? The first time?

Q. Yes. A. On June 5th. [75]
* * * * *

Q. Was that before or after you went to Her-
miston? A. That was before. [76]
* * * * *

Mr. Collins: No further questions. [80]
* * * * *

Redirect Examination

Q. (By Mr. Crutcher): Now, Mr. Lower, there are a couple of points which I failed to clarify originally, and one of those was did you receive any monies either from Mr. Tobin, the owner, or from Capt. Moore, the master, or from Mr. Gehrig, the business agent, or from any one else connected with the Silver Spray for the services which you performed aboard the vessel? A. No.

(Testimony of Harry C. Lower.)

Q. Was the \$80.00 which you received for ship money in Ketchikan sufficient for the needs of the vessel during the time you were in Alaska after Mr. Tobin left? A. No. [81]

* * * * *

Q. On cross examination you were asked whether you had been fired, in so many words, and you said no. Are you referring now to words of discharge used by Mr. Tobin or are you reaching a legal conclusion? * * * * *

A. Guess I was reaching a legal conclusion.

Q. (By Mr. Crutcher): Well, did Mr. Tobin ever ask you to leave the service of the vessel in so many words? A. No.

Q. You were also asked on cross examination whether you objected to going after shrimp in Alaska. Were you consulted by Mr. Tobin and asked for permission to go?

A. No. I was told we were going to Alaska.

Q. At any time did Mr. Tobin call a meeting [83] of the crew members or the working shareholders and either inform them or ask them anything about the abandonment of the tuna venture?

A. No. * * * * *

Q. You also said on cross examination that you agreed to work cargo in Alaska with the Silver Spray. Were you asked by Mr. Tobin for permission to engage in such work? * * * * * [84]

A. No.

(Testimony of Harry C. Lower.)

Q. (By Mr. Crutcher): Did you tell Mr. Tobin you wanted to go to Alaska? A. Yes.

Q. On what occasion was that?

A. Just before we left.

Q. In connection with what conversation was that remark made, do you recall?

A. Well, he said: "We are going to Alaska," and I said: "Okay".

Q. Was that in connection with the initial cruise? A. Yes.

Q. Had he told you or did you understand that you were not going tuna fishing? A. No.

Mr. Crutcher: I have no other questions.

* * * * *

The Court: Call the next witness. [85]

Mr. Crutcher: I wish to read into evidence the interrogatory and answer to interrogatory No. 1. This was filed on August 31, 1954 and is entitled "Interrogatories Propounded to Respondent".

* * * * *

Mr. Crutcher: The first interrogatory, No. 1: "On what date did you become the owner of the vessel Silver Spray?" Answer: "On or about April 28, 1954."

I wish next to read into evidence [86] interrogatory No. 8: "State whether you made any arrangements or agreement with any person or business firm to use the Silver Spray for tuna fishing during the 1954 season. If your answer is yes, state with whom you made the arrangement or agreement, and when." Answer: "Yes, I had arrangements with

(Testimony of Harry C. Lower.)

Lower, Herning, Peecher, Barquist, Bunker to use the vessel for tuna during the 1954 season." [87]

* * * * *

FERN LOWER

called as a witness by and on behalf of libelant Harry C. Lower, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Crutcher): Will you please state your name to the Court?

A. Fern Lower.

Q. And are you the wife of Mr. Harry C. Lower, the libelant in this action?

A. I am.

* * * * *

Q. And are you acquainted with the transaction [89] which took place in Spokane on April 17th?

A. I am. [90]

* * * * *

Q. Passing on now to the next time when you saw Mr. Tobin, did you ever see Mr. Tobin again?

A. No. That was the one and only time I ever saw him.

Q. Did you come to Seattle on June 5th?

A. I came to Seattle on June 4th.

Q. And that was——

A. Friday.

Q. The time the vessel arrived back in Seattle, was it not?

A. The day following.

Q. Did you attempt to see Mr. Tobin on that day?

A. I attempted to find out where Mr. Tobin was.

(Testimony of Fern Lower.)

Q. And what sort of inquiry did you make?

A. I contacted Mr. Gehrig as to Mr. Tobin's whereabouts.

Q. And did Mr. Gehrig tell you?

A. Mr. Gehrig informed me that Mr. Tobin was in Spokane.

Q. Did you attempt to contact Mr. Tobin in [92] Spokane?

A. I did. I asked Mr. Gehrig for Mr. Tobin's telephone number. I called. Mr. Tobin was not there.

* * * * *

Q. Did Mr. Gehrig at that time make any representations to you as to the continuation of the tuna fishing venture?

A. May I relate my conversation with Mr. Gehrig?

Q. Very well.

A. I called Mr. Gehrig, and I said: "In view of the fact that Mr. Tobin has removed himself from the Silver Spray and removed himself from the City of Seattle, I am forced to get in touch with you as his business agent." I said: "I am at this time making formal [93] demand on you for the \$2500.00 which we used to purchase a share of the vessel." I said: "I believe you know, Mr. Gehrig, that we signed a contract with Mr. Tobin to go tuna fishing. The boat was to leave Seattle on May 15th. Today is June 5th." I said: "The boat is still here."

(Testimony of Fern Lower.)

Q. Did Mr. Gehrig say anything in answer to that?

A. He didn't get a chance to until just about that time, and then he said: "Mrs. Lower, I don't have any money. I have never at any time handled any of Mr. Tobin's money."

Q. Well, did he say anything about continuing the tuna venture?

A. No. Here is what he said. He said: "Give me an hour. I will see if I can get hold of Mr. Tobin. Then call me back." I said: "I will see if I can get hold of Mr. Tobin."

That is when I called Spokane. I couldn't locate the man so I called Mr. Gehrig back, and I said: "Now, if you would care to give us our \$2500.00, we will settle for that and go home and forget the fact that we have lost six weeks of work on the vessel; that we have been deprived of a season of fishing."

Q. Well, you don't have to go into that at this [94] time. I am primarily interested in what Mr. Gehrig had to say about the plans or intentions of Mr. Tobin.

A. He said: "Don't be hasty. Don't take any action. If the crew will stick together, we can still salvage something out of this. I know it looks bad, but I think we can incorporate and leave Mr. Tobin out of it."

Q. Was that, when he said "we", did you understand that he was referring to the working——

A. The crew members. * * * * *

(Testimony of Fern Lower.)

Q. When you said you had, during the course of your relation of that telephone call that you had, purchased a share of the vessel, did you misspeak yourself? Did you understand that you were purchasing a share of the vessel?

A. No. We understood we were purchasing a working share, and it was explained to us that that meant simply we went aboard and fished and had a share of the catch. [95]

* * * * *

Q. Was there any further conversation that you ever had with Mr. Gehrig or Mr. Tobin?

A. No. I told Mr. Gehrig at that time that if he couldn't settle with me—we would be glad to settle for the \$2500.00—if he couldn't, that we had to——

Q. No. That is not necessary.

A. Then that is all.

Mr. Crutcher: I have no other questions.

You may cross examine.

Cross Examination

Q. (By Mr. Collins): Mrs. Lower, you met with your husband and Mr. Tobin in Spokane?

A. I did.

Q. And you signed this agreement?

A. I did.

Q. You understood the agreement?

A. I understood it, yes. [96]

* * * * *

(Testimony of Fern Lower.)

Q. What led you to believe that Mr. Gehrig was Mr. Tobin's agent?

A. I said: "Mr. Gehrig, are you Mr. Tobin's [97] business agent, and he said: "Yes, I am."

Q. And so all the answers that you have given to Mr. Crutcher are based upon the fact that Gehrig claims that he was an agent?

A. Yes.

* * * * *

Q. But you have no confirmation of this agency from Mr. Tobin directly? A. No. [98]

* * * * *

Mr. Collins: I have no further questions.

Cross Examination

* * * * * [102]

Q. (By Mr. Carey): Referring to this conversation you had with Mr. Gehrig, did you have but one conversation with him?

A. I had two telephone conversations.

Q. I am referring to the occasion when you made a formal demand you say for \$2500.00.

A. Yes.

Q. Was that by telephone or face to face?

A. That was by telephone.

Q. Was that the only demand you made?

A. Yes.

Q. And that was on June 5? A. Yes.

Q. And where was your husband at that time?

A. He was standing right with me. [103]

* * * * *

(Testimony of Fern Lower.)

Q. (By Mr. Carey): Did you accuse Mr. Tobin of having treated you and your husband unfairly in connection with the execution of this undertaking?

A. Yes. May I state in what manner?

The Court: You may.

Q. Yes. Go ahead. That is what I am getting at. Mr. Tobin, when we signed our contract with [105] him to go tuna fishing, said the boat would leave Seattle on the 15th day of May. This was June 5th. The boat wasn't tuna fishing and it wasn't ready to go tuna fishing.

Q. And you thought that he had misrepresented things to you and had overreached himself?

A. Yes.

Q. And that is what you accused him of?

A. Yes, I accused him of.

Mr. Carey: That is all. [106]

* * * * *

JOHN KADLEC

called as a witness by and on behalf of libelant Harry C. Lower, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Crutcher): Will you please state your full name to the Court?

A. John Kadlec.

Q. Where do you live, Mr. Kadlec?

A. 4409 26th S.W. [108]

* * * * *

(Testimony of John Kadlec.)

Q. What is your occupation?

A. I am going to school, Broadway Edison.

* * * * *

Q. Mr. Kadlec, you are one of the libelants in this cause, are you not? A. Yes.

Q. Have you had any experience with vessels of any kind?

A. I have had very little experience with vessels, but I have an AB card signed for the port of South Chicago.

Q. Have you had experience on some other vessel than the Silver Spray? [109]

A. SS Linderbury.

Q. In what capacity did you serve aboard that vessel?

A. Wiper, ordinary seaman and freight handler.

Q. What was your rate of pay in that work?

* * * * *

A. It was around \$500.00 a month, room and board.

Q. You mean \$500.00 plus room and board?

A. Yes.

Q. How did you first hear of Mr. Tobin?

A. I answered an ad in the Seattle Times.

* * * * *

Q. Did you later pay him some money for a working share in a vessel? A. Yes.

Q. When was that?

A. The 14th of April, 1954. [110]

Q. And what vessel was that that you agreed to work on?

(Testimony of John Kadlec.)

A. I agreed to work on the—the share was sold on the Sockeye. It also stipulated it was on the tuna clipper, the Silver Spray.

* * * * *

Q. Can you explain that briefly?

A. Yes. He told me that I would get a third of a share on the Sockeye, or, in other words, if I bought a place on the Silver Spray I would receive \$100.00 a week.

Q. And when did you go to work for Mr. Tobin?

A. Approximately the 28th of April.

Q. What vessel did you go aboard?

A. The Silver Spray.

Q. Did you ever work for the Sockeye?

A. A little bit off and on.

Q. Was this after the 28th of April or before?

A. This was after.

Q. And what sort of work did you do aboard that vessel?

A. I painted it and did mechanical work, in the lavatories and general cleaning, general hand on the [111] boat.

* * * * *

Q. Did you accompany the vessel to Alaska?

A. Yes.

Q. What did you do generally on the trip North?

A. On the trip North I was assistant engineer.

Q. Did you stand a regular watch?

A. Yes.

Q. Which watch was it?

(Testimony of John Kadlec.)

A. I don't recall the exact watch it was. It was at midnight I believe.

Q. Before you left on that trip did Mr. Tobin consult with you as to the taking of the vessel North? A. No.

Q. Did you accompany the vessel from Ketchikan to Wrangell? A. Yes.

Q. Did you stand any watch on that trip?

A. From Ketchikan to Wrangell I was helmsman.

Q. Did you stand a watch on the voyage from Wrangell back to Ketchikan? [112]

A. Yes.

Q. What watch was that?

A. It was the same watch.

Q. Did you see Mr. Tobin after you returned to Ketchikan?

* * * * *

A. He asked me if I was satisfied on this boat, this Silver Spray, and that if I was satisfied, he would not replace me when we got back to Seattle.
* * * * * [113]

Q. Did Mr. Tobin pay you any of the wages which accumulated up to that time?

A. I received \$5.00. That was all.

* * * * *

Q. Were you on the vessel when it returned to Seattle? A. Yes.

Q. Did you perform any service on that voyage?

A. On the return?

Q. Yes. A. Yes. I was a helmsman.

(Testimony of John Kadlec.)

Q. When you returned to Seattle, did you stay [114] aboard the vessel? A. No. [115]

* * * * *

Q. While you were there aboard this vessel after it had returned from Seattle, did any person aboard the vessel remove his gear—or I should say—did you find, of your own knowledge, that any one aboard had removed his gear? A. Yes.

Q. And what person or persons were they?

A. Mr. Tobin's gear was removed.

Q. And who else, if any one?

A. I don't recall who else.

The Court: What day was this, if you know, [116] when you noticed Mr. Tobin's gear removed from the vessel?

Witness: On the morning of the 4th of June.

Q. (By Mr. Crutcher): Did you make any attempts personally to contact Mr. Tobin on the 4th, the 5th, or any preceding day in June?

A. I did through his business agent, Mr. Gehrig.

Q. Well, did you attempt through Gehrig to contact Mr. Tobin? A. Yes.

Q. Were you able to reach Mr. Tobin?

A. No.

Mr. Crutcher: I have no other questions.

The Court: Is there any cross examination of this witness relating to the questions addressed to him concerning the Lower claim set out in the Lower libel?

Mr. Collins: Yes, Your Honor.

May I have this marked?

(Testimony of John Kadlec.)

Clerk: Respondent's Exhibit A-3. Respondent's Exhibit A-4.

(Photograph marked Respondent's Exhibit A-3 for identification.) [117]

(Photograph marked Respondent's Exhibit A-4 for identification.)

Cross Examination

Q. (By Mr. Collins): You have before you, Mr. Kadlec, Respondent's Exhibits A-3 and A-4, which purport to be pictures of the Silver Spray. Do you recognize them? A. Yes.

Q. Is that the vessel you were on?

A. Yes.

Mr. Collins: I will offer them in evidence.

Mr. Crutcher: No objection.

The Court: Each of them is admitted.

(Respondent's Exhibit A-3 received in evidence.)

(Respondent's Exhibit A-4 received in evidence.)

Q. (By Mr. Collins): You said you were familiar with the supplies and gear aboard the vessel, is that right? A. Yes.

Q. Did you examine the fishing gear? [118]

A. No.

Q. Was there any gear aboard?

A. There was some; I wouldn't recall how much.

* * * * * [119]

Q. What gear of Tobin's was taken off the vessel when it got to Seattle?

(Testimony of John Kadlec.)

The Court: Do you mean his wearing apparel or something else beside wearing apparel?

A. Well, a radio and his sleeping bag and his personal belongings. [120]

* * * * *

Q. How much of Tobin's clothing was taken off?

A. There was none of Mr. Tobin's personal belongings left on board.

Q. When did you first meet Mr. Tobin?

A. About approximately April 12 of this year.

* * * * * [122]

Q. Now, on what date was that?

A. On April 13th.

* * * * *

Q. What did you talk about?

A. After his nephew left, we talked about this fishing venture, and I told him that I was not an experienced fisherman. I had never fished commercially in my life; that it was something I had always wanted to do; and he says: "Well, you don't need no experience in [124] this. We will teach you all you need to know." Therefore, I only had \$500.00 in cash, and the share was for \$1500.00, and as I was going to leave—I wanted to check with my wife first on it——

Q. I don't want to interrupt you, Mr. Kadlec. I want the whole story, and so does the Court, but were you not discussing the Sockeye at this time, another vessel? A. Yes.

Q. Now, please proceed then.

A. Then Mr. Tobin showed me a picture of the

(Testimony of John Kadlec.)

Silver Spray. He said: "I am planning on purchasing this boat." And he was telling me all about what a good boat—and he said: "If I decide to put you on this boat, that is where you will be," he said, "because you only have \$500.00 in this, and I want to put you wherever you are needed."

* * * * * [125]

Q. What did you talk about on the 14th?

A. That is when he took my \$500.00 and signed the contract, and that was all.

Q. You are still talking about the Sockeye?

A. Yes.

* * * * *

Q. Well, excuse me. On the morning of the 14th you gave him \$500.00, and you signed a contract on the Sockeye, and that was the entire conversation at that time?

A. Mr. Tobin also told me that if he decided to put me on this Silver Spray, which he showed me a picture of, that I would work for \$100.00 a week.

* * * * * [126]

Q. Did you tell anybody else on board that you were supposed to get \$100.00 a week?

A. No.

Q. Did any one ask you if you were getting \$100.00 a week? A. No.

Q. You knew the engineer was on a salary?

A. Yes.

Q. And you knew that Capt. Moore was on a salary? A. Yes.

Q. And also the cook?

(Testimony of John Kadlec.)

A. I did not know that. [132]

* * * * *

Q. Were you on board when Tobin left the vessel at Ketchikan? A. Yes.

Q. Do you know why he left the vessel?

A. No.

Q. You discussed it among yourselves that Tobin should go back to Seattle on ship's business, did you not? A. No.

Q. There was no talk at all?

A. None.

Q. Weren't you interested in why he left the vessel?

A. We were very much interested, sir, but that was beside the point.

Q. Beside what point?

A. Beside the point that he left and told the skipper that he ditched us there. [133]

* * * * *

(At 12:00 o'clock p.m., Wednesday, September 15, 1954, proceedings recessed until 2:00 o'clock p.m., Wednesday, September 15, 1954.)

Seattle, Wash., Sept. 15, 1954, 2:00 o'clock p.m.

* * * * * [137]

Mr. Collins: I believe all parties have stipulated and will agree that the contracts of Bunker, Peecher, Herning and Barquist may be introduced in evidence.

The Court: They may be marked respectively Respondents' Exhibits A-5, A-6, A-7 and A-8.

(Contract (Herning) marked Respondents' Exhibit A-5 for identification.)

(Contract (Peecher) marked Respondents' Exhibit A-6 for identification.)

(Contract (Barquist) marked Respondents' Exhibit A-7 for identification.)

(Contract (Bunker) marked Respondents' Exhibit A-8 for identification.) [143]

* * * * *

Mr. Wells: It was only with reference to these exhibits. I exhibited this check to Mr. Collins in the attorney's room and I understood there would be no objection to it. I show it to him now and ask that it be admitted in evidence.

The Court: As whose exhibit?

Mr. Wells: Intervening libelant Norman Bunker.

Mr. Collins: No objection.

The Court: Let the record show it is on behalf of Bunker.

Clerk: It will be Libelants' Exhibit 2. [144]

(Check marked Libelants' Exhibit 2 for identification.)

The Court: Then I understand counsel have no objection to the admission in evidence of Respondents' A-5, A-6, A-7 and A-8, being those blue contract forms which have been mentioned by Mr. Collins? Each of them is admitted accordingly.

(Respondents' Exhibit A-5 received in evidence.)

(Respondents' Exhibit A-6 received in evidence.)

(Respondents' Exhibit A-7 received in evidence.)

(Respondents' Exhibit A-8 received in evidence.) [145]

* * * * *

The Court: Libelants' Exhibit 2 is now admitted.

(Libelants' Exhibit 2 received in evidence.)

* * * * * [146]

Mr. Crutcher: The libelants Lower temporarily rest their case in chief.

Mr. Carey: Just for the purpose of the record, Your Honor, at this time I move to dismiss the libel so far as the libelant Lower is concerned for the reason that his uncontradicted testimony, as well as that of his wife, shows [147] conclusively and without any contradiction whatever that this is an action for fraud, not within the jurisdiction of an admiralty court.

The Court: The Court has considered the authorities cited yesterday further and also has considered some other authorities. The Court does now definitely deny the motion and overrules the objections.

You may have the witness sworn.

GEORGE S. HERNING

called as a witness by and on his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Allison): Your correct name is George S. Herning, is it not? A. Yes.

Q. Where do you reside?

A. 738 North 74th, Seattle, Washington.

Q. And you are married, Mr. Herning?

A. Yes. [148]

Q. Do you have a family?

A. I have two children.

Q. Now, Mr. Herning, were you born in Alaska?

A. Yes.

Q. You spent some time in your youth in Alaska? A. Spent all of my youth.

Q. How many years did you live in Alaska?

A. 41 years.

Q. Now, as a resident of Alaska, have you had any occasion to be acquainted with the fishing industry?

A. Yes. I was raised in a fishing village on the coast.

Q. And does your experience, Mr. Herning, relate to any specific experience as a fisherman while you lived in Alaska?

A. Yes. I have set net, drift netted, and fished out in the ocean on the boats, power boats.

Q. Have you had any experience in your fishing experience with diesel engines?

A. A certain amount, yes. [149]

(Testimony of George S. Herning.)

Q. Now, I believe, Mr. Herning, you testified your fishing experience had been limited to salmon fishing in Alaska? A. That is right.

Q. You had never been tuna fishing before?

A. No.

Q. Now, how did you become acquainted with the respondent Robert Tobin?

A. I seen an ad in the Seattle P.I.

Q. Do you recall when that was?

A. It was somewhere around about the 20th, I believe, of April.

Q. 1954? A. Yes.

Q. Do you recall the contents of that ad?

A. It stated, I believe, "share for sale in tuna clipper sailing for Southern Banks" or something to that effect.

* * * * *

Q. Well, you did subsequently talk to Mr. Tobin? A. Yes.

Q. When did this conversation occur with Mr. Tobin?

A. Well, Mr. Tobin I think the next day called me by phone. [151]

Q. That would be about April 21, 1954?

A. About that time, yes.

Q. Now, did you make an appointment with Mr. Tobin?

A. Yes, I did. I made an appointment, and he asked me to come down to the boat, the Silver Spray. [152]

* * * * *

(Testimony of George S. Herning.)

Q. Did Mr. Tobin explain to you in what respect the vessel would be used?

A. He said that he had a contract lined up with the Van Kamp Cannery at San Diego and the boat would be sailing approximately May 15th for California to go tuna fishing.

Q. Now, did you discuss with Mr. Tobin about tuna equipment aboard the vessel?

A. Not at that time, no.

Q. Well, did you subsequently discuss it with Mr. Tobin?

A. Yes, the next day when I went down again.

Q. That was about April 23rd?

A. About that time, yes.

Q. What conversation did you have with Mr. [153] Tobin concerning tuna equipment aboard the vessel Silver Spray?

A. He said that he had equipment that he purchased with the boat that was stored in a warehouse, and that when he got to California they were going to put on bait tanks and refrigeration in the boat.

Q. Now, Mr. Herning, did you notice any tuna equipment aboard the vessel when you went on board?

A. Well, yes, I noted that the trolling arms—there were two trolling arms on the boat that went up each side of the mast—could be let out, and there was a guard rail on the back of the boat, and in the hold it had storage bins. [154]

* * * * *

(Testimony of George S. Herning.)

Q. And, also, did he discuss refrigeration of the vessel?

A. He said they were going to put refrigeration on the boat.

Q. Now, when did you report aboard the Silver Spray? That is, to begin your employment.

A. I believe it was on a Monday, the 26th.

Q. Monday, the 26th of April, 1954?

A. Yes.

Q. Now, what did you do when you first reported aboard?

A. Well, I went aboard the boat, and Mr. Tobin told me to go down in the engine room and start cleaning up. There was a lot of stuff stored down there, under the bilge it was. There was a lot of things that had fallen down in the oil and water, and underneath the shell there there was a lot of stuff just thrown in, stored, and we started taking that out and putting it out on the deck and separating it.

Q. Now, Mr. Herning, did you confine your work aboard the Silver Spray to the engine room at all times [155] pertinent to this action?

A. At all times and the heating plant.

Q. Now, I understand from previous testimony that the vessel sailed May 17th for Ketchikan?

A. That is right.

Q. Did you so serve aboard the vessel during this voyage? A. I did.

Q. In the engine room? A. Yes, sir.

* * * * *

(Testimony of George S. Herning.)

Q. Did you learn during this voyage to Alaska that there were any experienced tuna fishermen aboard [156] the vessel?

A. Yes. There was no tuna fishermen aboard the vessel at all. No man had ever been tuna fishing.

Q. Have you had a previous conversation with Mr. Tobin relative to experienced tuna fishermen aboard?

* * * * *

A. That was one of the questions I asked Mr. Tobin. Was any of the men he had signed up, if they were tuna fishermen? He told me he had two men that had fished tuna. [157]

* * * * *

Q. Were you asked by Mr. Tobin whether or not you would agree to go to Alaska?

A. No.

Q. Is your testimony now, Mr. Herning, that you just went to Alaska with the boat as a crew member, is that correct? [158]

A. That is right.

Q. Now, there has been some testimony about a shakedown cruise to Alaska. The purpose was a shakedown cruise. Now, did you as an engineer aboard the vessel do any work on the engines during this trip to Alaska?

* * * * *

A. The pumps were not working, the bilge pumps, and we took them off and took them up to the Ketchikan Machine Works, and they worked them over and overhauled them.

(Testimony of George S. Herning.)

Q. Now, you came down to Seattle on the Silver Spray? A. That is right.

Q. And you served as engineer on that voyage back to Seattle? A. Yes.

Q. And after the vessel arrived in Seattle, will you tell the Court what you did?

A. We got in here—I believe it was on the Thursday morning—about five o'clock, and I told Capt. Moore that I was going to go home. [159]

Q. For liberty? A. Yes.

Q. Now, at the time you went home was all your gear and personal belongings still aboard the vessel?

A. Everything I had left right on the boat.

Q. Will you continue with your testimony?

A. When I left, I told Capt. Moore that if they wanted me or needed me, to call me at home, if anything came up, and I think it was about between ten and eleven o'clock Thursday morning the phone rang and I answered it, and Mr. Tobin was on the phone, and——

Q. Just a minute. Will you tell the Court what date this telephone conversation occurred with Mr. Tobin?

A. That was Thursday, Thursday morning around about between ten and eleven o'clock.

Q. Would that be Thursday morning, June 3, 1954?

A. Yes. It was the morning we got in port.

Q. June 3, 1954? A. That is right.

Q. Now, will you tell the Court the essence of

(Testimony of George S. Herning.)

this conversation between you and Mr. Tobin on the telephone?

A. Mr. Tobin asked me if I thought that I could handle the engine room alone. [160]

Q. And what did you answer?

A. I told him that I thought I could handle the engine room sufficiently, and he told me that he would contact me later.

* * * * *

Q. And during this conversation did Mr. Tobin mention anything about whether the vessel would sail for Southern waters?

A. No, he didn't not at that time. It was a very short conversation.

Q. Now, since that phone call from Mr. Tobin, have you seen or talked to him prior to this litigation in this Court in the last few days?

A. No. I have not. [161]

Q. Have you tried to locate Mr. Tobin?

A. Yes, I have, at different times.

Q. Have you held yourself out and available to serve aboard the Silver Spray as assistant engineer?

A. I have.

Q. Since the conversation with Mr. Tobin?

A. That is right.

Q. Now, when you last went aboard the vessel, can you tell the Court what the status of the fuel supply was aboard the vessel?

A. Oh, I would say there was in the neighborhood of—the fuel tanks I would say were about half capacity, filled to about half capacity.

(Testimony of George S. Herning.)

Q. What about provisions and stores?

A. Stores were very, very low.

Q. Now, after this phone call, this phone conversation with Mr. Tobin on the morning of June 3rd, did you go back aboard the vessel?

A. I went back that afternoon, I think about one o'clock, and stayed there until nearly four o'clock.

Q. And did you go back on the vessel after that?

* * * * *

A. Oh, yes. I went back every day to the vessel.

* * * * * [162]

Q. When did you finally remove all of your gear from the vessel?

A. I think it was on a Tuesday afternoon following our arrival here.

Q. That would be——

A. Approximately about the 8th, I believe. [163]

* * * * *

Q. Did you ever make a formal demand upon Mr. Tobin for the return of the \$2500.00 that you invested as a working share?

A. No. I never could contact the man.

Q. Was there a period of about a month that you were in Seattle before you became employed with MacPherson Realty?

A. Yes, approximately a month.

Q. What did you do during that month?

A. I didn't do anything. I just was waiting to get some word.

Q. Some word from whom?

A. From Mr. Tobin.

(Testimony of George S. Herning.)

Q. In other words, your testimony is that during this month you held yourself available to continue serving aboard the Silver Spray?

A. That is right. * * * * * [164]

Q. Mr. Herning, the last question which I will ask you now is, as a man who had had previous fishing experience in Alaska, did you consider the Silver Spray equipped for tuna when you went aboard?

A. No, I don't. It was equipped partly, but it had to have bait tanks, and it had to have some kind of refrigeration for tuna fishing.

Q. Now, assuming these two facts, that the bait tanks and refrigeration would be put aboard in California, as Mr. Tobin told you, did you consider the vessel then equipped for tuna fishing?

A. Yes.

Q. Now, you have testified that Mr. Tobin told you he had a contract with Van Kamp's?

A. He said he was lined up with Van Kamp's at San Diego.

Mr. Allison: You may examine. [165]

Cross Examination

Q. (By Mr. Collins): Mr. Herning, how many years have you fished for salmon in Alaska?

A. Oh, off and on, I would say probably five to six years.

Q. What type of fishing?

A. Drift netting, set netting, and trap fishing.

Q. On a lay basis? A. (No answer.)

(Testimony of George S. Herning.)

Q. Do you understand what I mean? Well, I will change the question. On a share basis?

A. On a share basis, yes, sir.

* * * * *

Q. Being on a share basis, you knew that in [166] this Tobin venture you would be paid out of the share of any catch that might have been made?

A. That is right.

Q. And you are well aware of the risks of fishing then? A. That is right.

Q. When you speak of bait tanks on board the Silver Spray, do you know the difference between bait fishing and jig fishing insofar as tuna is concerned?

A. I have never been tuna fishing. I don't know a thing about tuna fishing, sir. I stated that.

Q. Did you see any equipment on board for fishing tuna?

A. No, no gear. The poles were up, and the hold was equipped for ice and storage, and the guard rail was on the back of the boat.

Q. There were lines aboard, were there not?

A. I didn't see any lines. I understand those were stored in the warehouse down at Lake Union; the fishing equipment was there.

* * * * *

Q. Will you tell me the circumstances of Mr. Tobin's departure from Ketchikan to Seattle? [167]

A. I don't know.

* * * * *

(Testimony of George S. Herning.)

Q. When did you first notice Mr. Tobin's absence?

A. I forget. Somebody come on board and said that he had left that afternoon for Seattle by plane.

Q. For what purpose?

A. I don't know what the purpose was for.

Q. Well, weren't you curious as to the purpose?

A. I was in a way, but nobody seemed to know.

Q. Now, in the courtroom we have Capt. Moore, Mr. Tobin, and Mr. Gehrig. Did any of them have a [168] conversation with you as to the purpose for Mr. Tobin's trip to Seattle?

A. I believe one of them did tell me after he had left that he was coming to Seattle to pick up some money.

Q. For the business of the Silver Spray, is that correct?

A. It wasn't stated to me what it was for.

Q. When you came back to Seattle—I understand from your testimony that you arrived June 3 and that seems to be established—you then went home? A. That is right.

Q. Where is your home?

A. 738 North 74th.

Q. In Seattle? A. Yes.

Q. Prior to that, you had contacted Tobin in Spokane or where? A. Prior to that?

Q. Prior to June 3?

A. I contacted Mr. Tobin right here in Seattle.

Q. In Seattle?

A. Aboard the Silver Spray.

(Testimony of George S. Herning.)

Q. Did you know his address?

A. In Spokane? [169]

Q. Yes. A. No, sir, I did not.

Q. Did you ever telephone Mr. Tobin or his wife in Spokane? A. No, I did not.

Q. Then on June 3, about ten o'clock, Mr. Tobin telephoned you at your house?

A. That is right.

Q. And asked you if you could handle the engine room? A. That is correct.

Q. For the purpose of proceeding with the venture?

A. He didn't say anything about where we was going or where he figured on going. He just asked me that question—if I thought I could handle the engine room—and I said I thought I could, and he said: "I will contact you later", and he hung up.

Q. Well, your understanding was at that time that you were going to take the boat out some place for some operation?

A. I presumed that it was going to go somewhere, but where I didn't know. [170]

* * * * *

Q. What happened the next day, June 4th, which is a Friday?

A. I went down to the vessel in the morning, stayed down there about, oh, I don't know, two or three hours. Nobody came around so I went back home again.

Q. Wasn't Helwig there on the 4th?

A. Yes, he was.

(Testimony of George S. Herning.)

Q. And who else?

A. I believe Capt. Moore was aboard, too.

Q. Did Capt. Moore tell you that Tobin had to go to Spokane because his little girl was sick? [171]

A. It seems to me like somebody did tell me that, but I don't recall who it was.

Q. Well, please detail the events of Friday, June 4th, as well as you can recall.

A. I was down to the boat for approximately—I would say three or four hours—and there was only two or three men there, and there was nothing doing. We just sat around and talked. So I went home, and I left word with them—I think Mr. Peecher was there—I left word later on during the day if they wanted me or if anything took place, if Mr. Tobin came, why, to contact me at home by phone.

Q. Now, on June 4th, you say some men were there and you sat around and talked. What men were there?

A. Mr. Peecher was there, I believe, and Mr. Barquist.

Q. What did you talk about?

A. Nothing, in general. Just waiting for Mr. Tobin to come.

Q. You knew the boat had to go in drydock?

A. Well, I presume it had. It had struck a log, had propeller trouble.

Q. And you knew there would be some delay for three or four days before any operation could be put into effect, didn't you? [172]

(Testimony of George S. Herning.)

A. Yes, that is right. [173]

* * * * *

Q. Now, then, Mr. Herning, when, where, and under what circumstances and who was present, if any one was present, did Tobin fire you?

* * * * *

A. Tobin, he never fired me.

Q. When did you decide to try to get your \$2500.00 back? [175]

* * * * *

A. It was approximately I would say about two weeks after we arrived in port. Mr. Gehrig told me that Mr. Tobin had a lawyer. I believe his name was Swontkoski, and I called up Mr. Swontkoski on the phone.

* * * * *

Q. Well, please proceed, sir.

A. (Continued) I asked Mr. Swontkoski where I could get in touch with Mr. Tobin, and he asked me what I wanted, and I told him that I understood the vessel had been attached and that I would like to get in contact with Mr. Tobin to find out what he was going to do. He [176] told me over the phone—he said: “I will notify you within two or three days what is going to take place.” About the third or fourth day after that conversation I received a letter from Mr. Swontkoski by registered mail stating—I can’t say word for word—but stating that Mr. Tobin was going to take care of the shareholders and the money that they had invested in the boat. [177] * * * * *

(Testimony of George S. Herning.)

Q. Did you understand the share agreement which you signed? A. Yes.

Q. Did you read it? A. Yes.

Q. You understood that in the event Mr. Tobin should release you that he would have ninety days to pay your money back?

A. That is right.

Q. You also understood that if you wanted to leave the vessel you were to give him thirty days' notice? A. That is right.

Q. Did you do so?

A. I gave his lawyer the notice when I called him up over the phone.

Q. Was that thirty days?

A. It was approximately two weeks after we arrived in Seattle. [178]

Q. Now, the fact is, Mr. Herning, that you did not give Mr. Tobin any time within the contract you signed to keep that vessel in operation, sell your share, and pay you the money back, did you?

A. I couldn't get in touch with Mr. Tobin at all. I waited for two months trying to get some word from the man.

Mr. Collins: I have no further questions.

Cross Examination

Q. (By Mr. Carey): In order that I may be sure of the dates so far as it affects my clients, you went aboard the vessel here in Seattle on April 26, 1954? A. That is correct.

(Testimony of George S. Herning.)

Q. From April 26 to May 17th you were doing work on her here in port?

A. That is right.

Q. Here in Seattle? A. That is right.

Q. Then on May 17 you started on this trip to Alaska? A. That is correct.

Q. And during that time you were doing engine room work? [179] A. That is right.

Q. And you arrived back in Seattle then on the morning of June 3rd?

A. That is correct.

* * * * *

Q. You had no separate agreement with him concerning any wages for this trip to Alaska and back? A. No.

Q. Do you recall, Mr. Herning, the date on which you put up the \$2500.00? [180]

* * * * *

A. It was the day that I signed the contract. I give him the check.

Q. Well, that answers it then. Is it your claim, Mr. Herning, that you put up this \$2500.00 because Mr. Tobin misrepresented to you about this proposed trip and the availability of the boat for tuna fishing? A. That is right.

Q. And what you are really complaining about is that he did misrepresent to you, got \$2500.00 from you, and you want to get that back, is that it?

A. Well, I want to get back what I figure I [181] having coming.

Q. And that is the \$2500.00 you put up?

(Testimony of George S. Herning.)

A. That is right.

Mr. Carey: That is all.

Redirect Examination

Q. (By Mr. Allison): Mr. Herning, did Mr. Tobin make any representation to you during the time you discussed this contract about the earnings you might expect to earn from the fishing season?

A. I believe that was discussed, and it was said some of the boats made as high as \$5,000.00 in just the fall fishing alone, \$5,000.00 per man.

Q. Based on that conversation with Mr. Tobin you bought into this fishing share arrangement, is that correct? A. That is right. [182]

* * * * *

Q. Mr. Herning, when did this conversation with Mr. Tobin about the anticipated earnings occur?

A. That was the first day I talked to him on the boat.

Q. That was the day that he told you that some vessel earned so much money and other vessels earned a different amount, is that correct?

A. That is right. [183]

Mr. Allison: I think that is all.

Recross Examination

Q. (By Mr. Carey): Mr. Herning, in view of your experience in fishing in Alaska, you know that nobody can predict three, four or five months in advance what the run of any fish will be, don't you?

A. That is right.

(Testimony of George S. Herning.)

Q. And that would apply to tuna as well as salmon? A. That is right.

Q. So this opinion of Tobin was just a hope, not a guarantee?

A. It was based on what the boats that had been there the previous fall had made.

Q. You knew it was what he hoped to do, that is all? A. It could be.

Mr. Carey: Yes.

Mr. Allison: That is all.

Mr. Collins: No questions.

The Court: Step down.

(Witness excused.) [184]

* * * * *

Mr. Armstrong: If the Court please, I would like to Call Mr. Peecher at this time.

EDGAR L. PEECHER

called as a witness by and on his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Armstrong): Your name is Edgar L. Peecher? A. That is right.

Q. And where do you reside, Mr. Peecher?

A. 8015 S.W. 45th Street, Portland, Oregon.

Q. How long have you lived in Portland, Oregon? A. Oh, about thirty years. [185]

* * * * *

Q. Had you ever had prior to April 1954 any experience as a commercial fisherman?

(Testimony of Edgar L. Peecher.)

A. None whatsoever.

Q. Were you familiar with vessels prior to April of 1954?

A. Well, I had longshored for ten years. I had been on many, many boats, not necessarily fishing boats.

Q. How did you come in contact with Mr. Tobin?

A. I saw an ad in the Seattle P.I. It said: "Commercial fishing, tuna clipper, leaving for Southern waters."

Q. Do you know approximately when you saw that?

A. It was sometime the latter part of April.

Q. What did you do with regard to the ad?

A. I wrote a letter and inquired.

Q. Did you get a response to your inquiry?

A. I got a telegram, yes. [186]

Q. Who did you receive that telegram from?

A. I received the telegram from a man by the name of Flagler.

* * * * *

Q. Did you discuss with Mr. Flagler anything about the vessel Silver Spray?

A. Yes, I talked with him about it, and he said that the man that owned the boat had just left to go to the boat, and he told me where the boat was at, and if I wanted to talk to Mr. Tobin about the project that I should go down to the boat tied up at Pacific Fishing & Trading Company.

Q. Did you do that? [187]

A. After I had my dinner, I did that, yes.

(Testimony of Edgar L. Peecher.)

Q. Do you know what day that was on?

A. It was the latter part of April. I don't recall the exact date.

Q. You did go to the vessel you have said. Who did you see on the vessel?

A. I saw Mr. Tobin.

* * * * *

Q. Will you relate, as closely as you can remember, the conversation that took place between you and Mr. Tobin on that occasion?

Q. I inquired into what the venture was going to [188] be, what their plans were as to what they were going to do with the boat. They said they were going to San Diego on tuna fishing and——

Q. Did he tell you whether or not he had a contract to fish in San Diego?

A. Yes. He told me that the ship was contracted to Van Kamp's Cannery, that they would get bait tanks and refrigeration at San Diego. It was supposed to leave no later than May 15th, and was supposed to be in San Diego at Van Kamp's Cannery no later than June 1st. The ship was contracted to Van Kamp's Cannery.

Q. Did you discuss with Mr. Tobin on that occasion anything with regard to who or what the experience of other crew members was?

A. Yes, definitely.

Q. What did you have to say to him or he have to say to you about the experience of other men on board the vessel?

A. The first thing I told him was that I had had

(Testimony of Edgar L. Peecher.)

no fishing experience myself, but I asked if he had any experienced men in the crew. He said he had two experienced San Diego fishermen. They weren't aboard the boat and wouldn't be aboard the boat until we got to San Diego. They both had very important jobs in Seattle, and after we got to San Diego they would quit their jobs and [189] fly down so that they could stay on their jobs here as long as possible. He also told me that a man by the name of Jim Gehrig was going to navigate the boat down to San Diego for us as a courtesy, and then he would in turn fly back, that he was not going to go fishing.

Q. Did he tell you who was going to be the skipper or captain of the boat?

A. He was the captain or skipper.

Q. Did he say anything about the prospective earnings or earnings which you could expect to make on this venture?

A. Yes, sir.

Q. What did he say?

A. From \$5,000.00 up.

Q. Did you inquire as to the gear that was on board the vessel?

A. Yes, I did.

Q. To what extent did you inquire?

A. Mr. Tobin took me over the ship. I formed the opinion, my own opinion, that the ship was sound, but not knowing what was required for tuna fishing other than the bait tank, I didn't know whether there was sufficient fishing gear on there or not. I did see that they had two fishing arms, one on each side of the boat. They were up. But there

(Testimony of Edgar L. Peecher.)

was no other gear to my knowledge on the ship.

* * * * * [190]

Q. And did you pay him any money for a working share in the vessel?

A. At that time, when I agreed to take the share, I gave him \$20.00, all the money I had in my pocket, to show my earnestness in it, and then in a day or two I had a check sent from Portland and handed the check to him in full.

Q. In what amount of money?

A. \$2500.00.

Q. Did you go on board the boat during April?

A. I didn't go to stay.

Q. When did you first go to work on the boat?

A. I even went to work on the boat before we signed the contract. I quit my job at Pacific Car & Foundry and come down and helped them paint and make ready.

Q. You signed your contract on May 4th, so you mean some time prior to that? [191]

A. Sometime prior to that, yes, I worked on board the ship.

Q. How long did you continue to work on board the vessel prior to the time it departed for Ketchikan, Alaska?

A. I worked right up all the time.

Q. Were you on board the vessel every day?

A. Every day.

* * * * *

Q. What was your understanding with Mr.

(Testimony of Edgar L. Peecher.)

Tobin as to what you were to do after you signed the contract?

A. I told Mr. Tobin that I had formerly been a longshoreman; that I didn't know anything about the navigation of a boat; but I did know about stowing cargo and taking care of the ship's gear, and such as that. So I was told by Mr. Tobin that that would be my job, to take care of the hold and any cargo that should be put in.

Q. Where were you to go and for how long were [192] you to be employed?

A. We were supposed to go to San Diego on a tuna fishing trip, and to the best of my knowledge it was from now on.

Q. You mean from then on?

A. From then on, yes. There was no set period of how long we would be on the trip.

Q. Were you going to stay there for the full 1954 tuna fishing season? A. Yes, sir.

* * * * *

Q. What was said by you or by Mr. Tobin to you with regard to the departure of the vessel for Ketchikan from Seattle?

A. He come aboard the ship one afternoon about, [193] oh, somewhere between 2:00 and 4:00, and said: "We are going to Alaska in the morning." That was all the consultation that was held with me.

Q. Were you given any opportunity at all to or permitted to express your opinion as to whether or not you desired to go to Ketchikan?

(Testimony of Edgar L. Peecher.)

A. None.

* * * * *

Q. Did you say anything to Mr. Tobin about going to Alaska? A. I did.

Q. What did you say?

A. I told Mr. Tobin that I, as one individual, didn't care to go to Alaska; that that wasn't what I come aboard the ship for; I come aboard the ship to go to San Diego on a tuna fishing trip.

Q. What did he say?

A. Well, he said: "Why take a chance on tuna fishing when you can go to Alaska and make all this money? There is going to be a lot of money made by the ship, and all these men have to have wages coming in"—he had ten [194] men aboard—"they have families to worry about making a living for"—and he couldn't let one man interrupt that.

Q. Did you have any choice as to whether or not you could go to Alaska?

A. I had no choice.

Q. You did go to Alaska?

A. I did go to Alaska.

Q. When did you leave the vessel?

A. Some time after the vessel came back from Wrangell to Ketchikan.

Q. Under what circumstances did you leave the vessel?

A. After we got to Alaska we run into very severe weather from my standpoint.

(Testimony of Edgar L. Peecher.)

Q. Will you explain what you mean by "your standpoint"?

A. I am subject to arthritis, and the weather was very damp, moist, cold up there, and it didn't agree with my health at all. I began to swell up in my hands and my ankles, my knees, so I could see there was only one thing for me to do was to get out of Alaska.

Q. So what did you do in that regard?

A. I asked Mr. Tobin if I could come back to Seattle and get out of it. [195]

Q. Now, at that time, did you ask Mr. Tobin whether you could be completely released from the vessel or what was the subject of your conversation?

A. Mr. Tobin took one look at me and he said: "I realize that you have no business up here." So he said: "I am not going to try to hold you here in any way." He said: "I am going back to Seattle today by plane, and if you want me to, I will get two tickets while I am at it, and we will both go together." And I said: "That is all right with me. Get the tickets." He asked me if I had the money to pay my own way, and I told him I did. I paid my own way.

Q. Was anything said about your rejoining the vessel when it returned to Seattle?

A. To my knowledge there wasn't.

Q. You mean there was nothing said?

A. No.

(Testimony of Edgar L. Peecher.)

Q. Well, were you leaving the vessel permanently when you left it in Alaska?

A. If the vessel was going to stay in Alaska, I would have left it permanently, yes.

Q. But had the vessel gone to California tuna fishing, what would you have done?

A. I would have gladly went along.

Q. As a matter of fact, you did come back to the [196] vessel when it arrived in Seattle with the intention of going on board and going to California, did you not?

A. That is right. * * * * * [197]

Q. When you talked with Mr. Tobin in Ketchikan on your return, did he say anything at all with regard to what he intended to do with this vessel, the Silver Spray?

A. At that time he said he was going to keep it there and open a lodge. They were going to use the vessel to take their prospective clients back and forth from the lodge to the airport or whatever it was necessary to use the boat for; that he had planned that for many, many months and he intended to keep it there.

Q. He advised you at that time then that he did not intend to go on this tuna fishing venture? [198]

A. That was the understanding that I had, yes.
* * * * *

Q. When did you board the vessel, Mr. Peecher?

A. In Seattle? I boarded the vessel on June 4.
* * * * *

Q. Was Mr. Tobin on board on the 4th?

(Testimony of Edgar L. Peecher.)

A. No, sir.

Q. Did you have occasion to observe whether or not his gear was on board the vessel when you went on board on the 4th of June?

A. Yes, I did. [199]

Q. Was the gear there or not?

A. No, it wasn't. [200]

* * * * *

Q. How long did you stay around the vessel or keep returning to the vessel, Mr. Peecher?

A. Several days.

* * * * *

Q. Did Mr. Tobin come on board the vessel during any of those days or contact the vessel to your knowledge? [201]

A. Not for several days he didn't.

* * * * *

Q. Were you present when he came on board on the evening of the 7th? A. Yes, I was.

Q. What conversation took place between Mr. Tobin and the crew members on board?

A. Well, Mr. Tobin walked into the galley of the ship. All of us were sitting in the galley. And he said that any one that was interested in the procedure to come and go with him to his lawyer's office.

Q. About what time of the evening was that?

A. I would say somewhere after 7:00 o'clock.

Q. In the evening? A. In the evening.

Q. What further was said in your presence on his boarding the vessel on that occasion?

A. There was two or three different ones that

(Testimony of Edgar L. Peecher.)

[202] asked him what he was going to do, what they were going to do, or what the general opinion was, and the only answer that I heard him give was that they was to go see his lawyer and it would all be thrashed out there, and that he had the money waiting there for any of those that wanted their money out of the venture.

Q. Did you go with him to see his lawyer?

A. No, I didn't.

* * * * *

Q. Did Mr. Tobin on the 7th of June say anything about his intentions to fish for tuna?

A. He never said anything then but I had received a letter from Mr. Tobin at my home in Portland after I come [203] back from Ketchikan telling me that the vessel was coming back, that they were going to San Diego fishing, and wanted to know if I wanted to continue on the voyage.

Q. Did he say anything about that letter when you talked to him on the 7th?

A. No. He never did.

Q. Was there any mention at all of the vessel departing for San Diego or for fishing for tuna?

A. Not that day, no.

* * * * *

Q. Which one of these persons said anything to [204] you about the plans of the vessel?

A. Jim Gehrig.

Q. Did you ever have any discussions with Mr. Tobin with regard to what relation Jim Gehrig had to the vessel Silver Spray or to Mr. Tobin?

(Testimony of Edgar L. Peecher.)

A. I was told by Mr. Tobin that Mr. Jim Gehrig was his business agent.

Q. Is it a fact or is it not a fact that the ad which you answered claimed and stated in it that Mr. Gehrig was the business agent?

A. That is right.

Q. I will now ask you the question what did Mr. Gehrig tell you about the plans of the Silver Spray?

A. Well, the statement that Mr. Gehrig made after the vessel came back from Ketchikan was that there could be something salvaged out of the whole venture then if we all got together and formed a company or some such thing and tried to remove Mr. Tobin from it, because he had felt like, as far as Mr. Tobin was concerned, he was all through with the venture. That was his idea. So there was talk of hauling apples back to Alaska or hauling knock-down defense homes or different things were brought up in different subjects and different conversations, but nothing concrete come out of any of it.

Mr. Armstrong: I have no further questions.

Cross Examination

Q. (By Mr. Collins): Mr. Peecher, when you left the boat in Ketchikan, you did so of your own free will?

A. That is right, with the consent of Mr. Tobin.

Q. You rode back on the plane with Tobin?

A. That is right. * * * * *

(Testimony of Edgar L. Peecher.)

Q. You knew he was coming down on Silver Spray business? A. No. I did not.

Q. What was he coming down for?

A. The only reason he gave me for coming to Seattle and going on to Spokane was that a man had to see his family once in a while.

Q. Didn't you know anything about the arrangement with Shell Fish, Incorporated?

A. Only hearsay.

Q. I will waive the hearsay rule if you will tell me what you know about it. [206]

A. I heard that we were supposed to have a load of fish at Wrangell to haul down for Shell Fish, Incorporated, I believe it was.

Q. You went to a port in Alaska to pick up shell fish? A. That is right.

Q. And there wasn't a cargo?

A. That is right.

Q. And Mr. Tobin went down to Seattle to straight out the arrangement?

A. Mr. Tobin didn't stop in Seattle other than to change planes, the same as I did. He went to Spokane, and I went to Portland.

* * * * *

Q. You were willing to leave the ship entirely at Ketchikan?

A. As long as it was going to stay in Alaska, yes.

Q. And you were willing to sell your share back to Tobin? [207]

A. If the vessel was going to stay in Alaska, I

(Testimony of Edgar L. Peecher.)

wanted no more to do with it, because I couldn't stay there on account of my health.

Q. Didn't he offer to pay you for your share?

A. No. He never did.

Q. Did he offer to try to sell another share and pay you your money back?

A. Yes, he offered that.

Q. You signed one of these general contracts, did you not? A. I did.

Q. And he offered to comply with the terms of that contract?

A. He offered at that time, yes.

Q. Now, you mentioned this hunting lodge. Didn't you and Tobin discuss many enterprises, including the hunting lodge, maybe fishing off Honolulu, off San Diego, maybe carrying freight to Alaska, and using two or more different boats in all these ventures?

A. I could answer that question by telling you this—that every time I heard Mr. Tobin talking about anything after I signed my contract, it was a different proposition every time.

Q. They were all business suggestions, in other words? [208]

A. I would suppose they would be.

Q. And you were willing to be convinced as to the plausibility of any of them, were you not?

A. No, sir.

Q. Well, at least you were interested in working with him up to the time that the venture folded?

A. My primary reason for going aboard the ship

(Testimony of Edgar L. Peecher.)

was to go tuna fishing off San Diego. If I had known that the vessel was going North of Seattle, I would have never went into the venture. I told him the only reason I wanted to go on it was because it was going South, where it was warm, where I would feel good. Mr. Tobin or nobody else can say that is not true because it is true. There was nothing ever said to me about going to Alaska or anywhere else other than San Diego until after I had my \$2500.00 in it. [209]

* * * * *

The Court: Will there be considerable more cross examination?

Mr. Collins: Yes, Your Honor.

The Court: Then I think we ought to suspend. Court is adjourned until tomorrow morning at ten o'clock. The witnesses are requested to be back again tomorrow unless the Court has otherwise directed.

(At 4:35 o'clock p.m., on Wednesday, September 15, 1954, proceedings recessed until 10:00 o'clock a.m., Thursday, September 16, 1954.) [210]

Seattle, Wash., Sept. 16, 1954, 10:00 o'clock a.m.

The Court: You may proceed with the case on trial. [211]

* * * * *

Q. (By Mr. Collins): When and where did Mr. Tobin discharge you?

A. I would say that he did when he abandoned the ship in Seattle. * * * * *

(Testimony of Edgar L. Peecher.)

Q. I believe you testified yesterday that from the time you and Mr. Tobin left the vessel in Ketchikan you had no further conversation about tuna fishing? [213]

* * * * *

A. No. I didn't say that.

Q. What did you say?

A. I said on the plane trip, while we was on the plane.

Mr. Collins: May I offer a document?

The Court: It will be marked.

The Clerk: Respondents' Exhibit A-9.

(Letters marked Respondents' Exhibit A-9 for identification.)

* * * * *

Q. (By Mr. Collins): You have been handed Respondents' A-9. There are two documents there, one a typewritten letter from Tobin to you and your reply to Mr. Tobin. Do you recall those documents? A. Yes, I do.

Q. Both of them? A. Yes, I do.

Mr. Collins: I will offer A-9, Your Honor. [214]

Mr. Armstrong: No objection.

The Court: Respondents' Exhibit A-9 is now admitted.

(Respondents' Exhibit A-9 received in evidence.)

* * * * *

Q. (By Mr. Collins): Now, as I have your notes here, you testified that as of June 3rd and for sev-

(Testimony of Edgar L. Peecher.)

eral days thereafter you planned to go tuna fishing with Mr. Tobin?

A. After I come back up to Seattle, yes.

Q. Well, did you change your mind after that letter? A. I did.

The Court: What was the date of your first return to Seattle after writing that letter?

Witness: June 4th. [215]

Q. (By Mr. Collins): As of May 29, you wanted your money back?

A. I would have taken it then, yes.

Q. Well, you wanted it back, did you not?

A. I would have accepted my money, yes.

Q. Did you make demand on Mr. Tobin at any time after May 29th for your money?

A. Yes. When I was told that he abandoned the ship, I asked him the first time I see him.

Q. Well, who told you that?

A. The balance of the crew that was on board ship.

Q. Well, name them, please.

A. Well, Harry Lower——

Q. Did Mr. Lower tell you that he talked to Tobin at the hotel, the Edmond Meany, on June 3rd?

A. I didn't see Mr. Lower on June 3rd. [216]

* * * * *

Q. Tobin came down to the boat and tried to get aboard, did he not?

A. Tobin came down to the boat on the evening

(Testimony of Edgar L. Peecher.)

of the 7th and got aboard, came right in the galley and talked.

Q. And you threatened him with physical violence, is that right? A. (Laughs.)

Q. I don't think it is funny, Mr. Peecher. Did you or did you not threaten him with physical violence?

A. Why, I might have threatened to punch him in the nose—might like to do it now.

Q. And who else wanted to punch him in the nose? A. No one to my knowledge.

Q. And then you, in harmony with these other men, put him back on the dock?

A. He went on the dock of his own free will. That is when he asked us all to go up to his attorney's office with him. He said everything would be straightened up at his attorney's. [218]

* * * * *

Q. Mr. Tobin suggested to you gentlemen that you see his lawyer and give him time to sell shares in the boat to other people so you men could be paid off, did he not? [219]

* * * * *

A. Yes.

* * * * *

Q. When did you first hear about this libel on the Silver Spray?

A. I first heard of Mr. Lower's contemplated [220] action on Saturday.

Q. That would be June 5th? * * * * *

Mr. Collins: I will terminate the examination.

(Testimony of Edgar L. Peecher.)

Cross Examination

* * * * [221]

Q. (By Mr. Carey): Your sole interest in the venture, as I understand, was to participate in this tuna fishing? A. That is right.

Q. You were not at all interested in the Alaska operation? A. Absolutely not.

Q. You had no contract to participate in that?

A. The contract called for tuna fishing in Southern waters.

Q. Yes, and that is the only contract you were interested in? A. That is right.

Q. You went to Alaska simply because the boat was [224] going there? A. That is right.

Q. And you went aboard pending the time it might come back and start to California waters for tuna fishing? A. That is right.

Q. Now, in answer just a few moments ago to a question asked you by Mr. Collins with reference to the occurrences on June 7, you said that on that date it was your disposition to punch Mr. Tobin in the nose. Why was it that you felt inclined to punch him in the nose? Was it because you felt that he had defrauded you?

A. I had already made up my own mind that I couldn't believe a word the man said.

Q. Well, did you think he had defrauded you in getting you into this deal? Was that it?

A. I certainly did.

Mr. Carey: That is all.

The Court: Any further questions of this witness?

Mr. Armstrong: No.

The Court: Step down.

(Witness excused.) [225]

* * * * *

HERVEY PETRICH

called as a witness by and on behalf of libelant Harry C. Lower, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Crutcher): Will you state your full name? A. Hervey Petrich.

Q. Where do you live Mr. Petrich?

A. I live at 3424 North 19th in Tacoma, Washington.

Q. What is your occupation?

A. I am affiliated with the Western Boatbuilding Company in Tacoma who build vessels, mainly fishing vessels, and my particular operation is to take care of the fishing boats in our fishing fleet owned by this company.

Q. Do you have a title as to that?

A. Nothing more than we are five brothers together, and we are all partners, and we don't give anybody any title over the others. [226]

Q. How long have you been connected with fishing vessels and fishing in general?

A. Oh, I have been with the company all my life. I would say in this particular operation actively engaged for 25 years.

(Testimony of Hervey Petrich.)

Q. During that time have you had any connection with the tuna fishing industry?

A. I have, yes.

Q. Does your company build tuna vessels?

A. Yes, we do.

Q. Does your company own any tuna fishing vessels? A. Yes, we do.

Q. Do you operate any tuna fishing vessels?

A. Yes. We are managing and owners of five tuna clippers and five purse seiners.

Q. In connection with that sort of work, have you had occasion to work in Southern California, particularly San Diego or in the Los Angeles area in connection with the tuna industry?

A. My work keeps me in Southern California most of the year.

Q. How long have you been doing that sort of work in Southern California?

A. Well, the active part has been most prominent since the end of World War II. [227]

Q. Would it be since 1946?

A. Since 1946, yes. However, I have been in it previous to the war—in other fields.

Q. I understand. Now, in connection with your work, do you have occasion to know about the catches of tuna and the prices paid for tuna in Southern California?

Mr. Collins: I object to the question and the answer of this witness upon the ground that it is irrelevant and incompetent insofar as these particular

(Testimony of Hervey Petrich.)

libelants are concerned. I would like to argue that objection.

(Argument.)

The Court: Do you wish your objection to run to all this line of testimony?

Mr. Collins: Yes, Your Honor.

Mr. Crutcher: No objection on my part.

The Court: The Court approves. Therefore, you may proceed but be certain to have in mind that the Court will later examine this, so if there are any aspects of it or objections that you think you might be alerted to by reason of their being stated, it is up to you to be so alerted.

Mr. Crutcher: Thank you, Your Honor. I will withdraw my previous question. [228]

Q. (By Mr. Crutcher): Mr. Petrich, will you tell the Court briefly what a tuna clipper is?

A. The interpretation of a tuna clipper is synonymous with a typical vessel found in Southern California in which they have tanks to carry live bait, and this live bait is thrown into the water, attracts the tuna, and the fishermen with poles and hooks or lures will bring the tuna back into the vessel.

Q. Does such a vessel have any refrigeration?

A. Normally, a large tuna clipper is completely refrigerated.

Q. Now, with reference to the size of tuna clippers, can you, as a boat builder, state the approximate range of size so far as length is concerned of a tuna clipper?

(Testimony of Hervey Petrich.)

A. Well, the vessels that we have been building up North for the Southern trade have been limited to the sizes from 85 feet to 170 feet. However, they do build smaller tuna clippers down as low as 45' and 50'.

Q. In the course of your work which you have described to the Court, do you have occasion to learn of the catches made by the various tuna clippers operating out of San Diego?

A. All records are always available to me. In [229] fact, that is the basis of determining whether a man is capable of running a vessel or not.

Q. Now, can you state to the Court whether there is such a thing as an average catch for tuna clippers of a particular size, that is, year after year?

A. Well, there is usually an average catch which is determined at the end of a season. We cannot determine and predict what the season will hold in the future.

Q. Does that average catch vary from year to year?

A. That average catch does vary, yes.

Q. Are you acquainted with the variations in average from year to year in the course of your work?

A. Yes. We make an estimate of what the average is and see whether a particular vessel is above or below that.

Q. In view of your experience in this field, would you be qualified to estimate the average catch

(Testimony of Hervey Petrich.)

in an average year for a tuna clipper approximately 80' long?

A. Yes. Going back over our records, we can.

Q. Have you had occasion to study your records recently in that respect?

A. I have, yes.

Q. Will you state to the Court what the approximate average catch of an 80' tuna clipper in an average [230] year would be in terms of tonnage?

A. In the average catch of an 80' bait boat or clipper, as you call them, we are assuming that—the carrying capacity is what we base it on, of course—now, you are speaking of 80'—however, that average run of vessel would run between 300 to 500 tons per year.

Q. Now, when you say you are referring to the capacity rather than to overall length, you mean the carrying capacity or the hold space of the vessel?

A. The amount of tuna that vessel can carry.

Q. What is the average carrying space of a tuna clipper approximately 80' over-all length?

A. The average would be between 90 and 120 tons on 80'. They normally have them up to 95', and that brings them up to about 150 tons' capacity.

Q. Now, when you speak of an average capacity of 90 to 120 tons, are you referring to weight or to cubic space?

A. I am referring to weight of the tuna that is unloaded.

(Testimony of Hervey Petrich.)

Q. Does that compare with cubic space? That is the normal cubic space ton of 40 cubic feet?

A. Well, normally, if we take a particular size of tuna, the average runs around 40 cubic feet for one ton.

Q. Forty cubic feet for one ton? [231]

A. That is right. That can vary with the size of the fish and how they pack it. It is just a rule of thumb figure.

Q. Assuming that a vessel had approximately cubic tonnage of 60 to 70 feet then, the catch would be smaller than for the vessel which you have described, would it not?

A. Yes. I would say that vessel would average around the lower levels of around 300 tons for the year, say 250 to 300 tons. These are just estimates, going by past experience.

Q. What type of fish are those?

Q. Yellow fin and skip jack, which is a species of tuna. On the market they are known as light meat tuna.

Q. Is there a fairly established price for yellow fin to the tuna vessel?

A. That is always established before they start.

Q. Does it vary from year to year?

A. Yes.

Q. Over an average period of say the last three years, what is the average price of yellow fin so far as you can recall it?

A. The average price of yellow fin is around \$320.00 a ton. However, we catch so much skip jack,

(Testimony of Hervey Petrich.)

and that is a lower price—\$280.00—so I would say the average for the two species as tuna would be around \$300.00 [232] a ton for the last two to three years.

Q. Do you happen to know what the price is this year?

A. Well, the price this year started out at \$350.00 a ton and a threatened tie-up resulted because they were getting so much tuna and so much tuna was being imported from Japan, that they agreed to reduce the price from \$350.00 on yellow fin to \$330.00. However, the year previous the price was \$320.00. [233]

* * * * *

Q. A moment ago, Mr. Petrich, it was pointed out to me that I inadvertently referred to 70' when I meant to say 70 tons. I was speaking of reduced tonnage capacity and you gave a lower estimate as to the average catch for a vessel of that smaller content. I now call that to your attention and ask you whether your answer would have been the same had I said 70 tons instead of 70'?

A. I was keeping in mind tonnage rather than footage.

Q. Thank you. Has the catch this year been below or above average so far?

A. The run of tuna has been exceptionally good, [234] but the market has been very poor. That is, the canneries, due to this higher price, were unable to accept it, and they would delay the vessels being unloaded, and tell them to lay down and not bring

(Testimony of Hervey Petrich.)

in so much; we can't take it. As a result, I would say the over-all picture is about the same as far as tonnage is concerned.

Q. The same as the average of previous seasons?

A. Yes. [235]

* * * * *

Q. Will the witness advise the Court how the average price this year so far compares with the prices for previous years? [237]

A. The average price this year up to July 27 was higher than it has practically ever been in the industry.

Q. And since that time, how was the price running in comparison with previous years?

A. The price is about the same at the present-time.

Q. Can you advise the Court as to the relative percentage of skip jack and yellow fin brought in in a normal season by an average small clipper?

A. I would say that the skip jack usually is a little more than the yellow fin. Perhaps—I would say it may be a 60-40 ratio. Sixty per cent would be the skip jack and forty per cent would be the yellow fin tuna.

Mr. Crutcher: I have no other questions.

The Court: You may inquire and you may cross examine without waiving your objections to this line of inquiry. Before that, however, we shall have a short recess at this time.

(Recess.) [238]

* * * * *

(Testimony of Hervey Petrich.)

Cross Examination

Q. (By Mr. Carey): The tuna boats that you operate and with which you are familiar in your own operation, I gather from your description they are what are called live bait boats——

A. The ones I have referred to in this court have been on the live bait vessels. However, we do operate purse seiners, also.

Q. Well, that is in the salmon industry, isn't it?

A. That is in the tuna industry, also.

Q. Do they catch tuna with purse seine boats?

A. Yes.

Q. Well, are those the purse seine boats that come down from Alaska to fill in the season or do they build them for tuna fishing?

A. They are strictly vessels that are used in Southern California for tuna, but they did come from this part of the country.

Q. Now, the vessels that you have been speaking about are vessels that are built as tuna clippers for live bait fishing?

A. Of the five vessels we have in the bait fishing game, four of them were built as that, and one of them was a converted Navy tug. [239]

* * * * *

Q. Have you ever seen this Silver Spray?

A. No, sir. I haven't.

Q. You don't know what its capacity is or suitability for catching tuna?

A. I have never seen it.

(Testimony of Hervey Petrich.)

The Court: Give him the length. The length has been previously mentioned.

Mr. Carey: It will take me a moment——

The Court: It has been stated as 80', and here is a photograph of it.

(Photograph handed to witness.)

Witness: This vessel is no bait boat. This is a jig boat or trolling boat. Well, we are or [243] have been talking about bait boats.

Q. (By Mr. Carey): What you have been testifying about throughout were the regular tuna schooners built for the tuna service and you haven't been talking about jig fishing at all?

A. No.

The Court: Well, do you know what the tuna cargo capacity of this vessel is, this vessel as you see it reflected in that exhibit?

Witness: I could never tell how much that carried until I went in and looked at the hold and saw how big it was.

Mr. Crutcher: On that one point we will produce evidence of the approximate——

Mr. Carey: I prefer that my cross examination not be interrupted, Your Honor.

Q. (By Mr. Carey): Now, you are asked about average catches during different years. The average may be of use for statistical purposes after the season is over, but the average for last year would be of no use at all as a prediction of what will be done this year, would it?

A. Well, the year has proceeded far enough for

(Testimony of Hervey Petrich.)

me to determine that this year is as good as last year.

Q. About an average year? [244]

A. Yes.

Q. But all the evidence you have given on that subject contemplates a live bait boat of large capacity with a large crew of experienced men?

* * * * *

A. My testimony has been on the basis of a bait boat.

Q. Has no relation to a jig boat such as the photograph discloses? A. No, sir.

Mr. Carey: That is all.

The Court: Anything further?

Mr. Crutcher: Yes, Your Honor.

Redirect Examination

* * * * * [245]

Q. (By Mr. Crutcher): Was your testimony concerning tuna clippers of approximately 80' in length, the testimony referring to averages, directed to bait boats of approximately 80' in length?

A. Yes.

Q. You referred in your testimony for Mr. Carey to a jig boat, did you not?

The Court: He did at one time when he was talking about that picture that was shown him, which is an exhibit in the case.

Q. Is there a difference between a jig boat and [246] a clipper? A. Yes.

Q. Is a jig boat ever referred to as a clipper?

(Testimony of Hervey Petrich.)

A. I have never heard of any jig boat being called a clipper.

Q. What is the essential difference between a jig boat and a clipper?

A. A jig boat can be used in very small vessels, and they troll like they troll for salmon. They draw a lure through the water. The poles are indicated. They have lures hanging from these just like a salmon troller. A bait boat is one that has circulating salt water and tanks with live bait, little bait in them kept alive.

Mr. Crutcher: I have no other questions.

Mr. Carey: At this time, Your Honor, I move to strike out, without any disrespect to the witness, all of his evidence for the reason that, according to his own admission, he has not testified to any such operation as we are dealing with here.

(Argument.)

Q. (By Mr. Crutcher): How many crew members are customarily employed on a jig boat?

A. Well, normally, a jig boat would have perhaps three men, two to three men, maybe four. [247]

Mr. Crutcher: I have no other questions.

Mr. Carey: I renew my motion.

The Court: The motion is denied with leave to renew it at the end of all of the testimony and after the close of all of the testimony on behalf of all litigants in the case.

You may step down.

(Witness excused.)

Call the next witness. We will swear the next witness after which we will take a recess until 1:45.

WILLIAM BARQUIST

called as a witness by and on his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Armstrong): Will you state your name, please?

A. William Barquist.

The Court: Is this witness called on behalf of the intervening libelant Barquist?

Mr. Armstrong: Yes. This is the intervening libelant Barquist. [248]

Q. (By Mr. Armstrong:) Where do you reside, Mr. Barquist?

A. Black Diamond, Washington.

Q. Do you have a street address there?

A. Box 342, Black Diamond, Washington.

* * * * *

Q. What capacity were you in in the Navy?

A. I was a seaman first class.

Q. On what type of vessel?

A. I was on several different types of vessels. [249] I was on a seagoing tug and I was in Navy gun crews on merchant vessels, and I served a little bit aboard a submarine tender.

Q. Did you have any experience in the operation of any of these boats while you were on board them?

A. Not in the operation of the boats. My duties

(Testimony of William Barquist.)

were gunnery. I took care of guns, maintained them and manned them if it was necessary.

Q. You did not have experience as a navigator or as a helmsman prior to your going on board the Silver Spray? A. No, I didn't.

The Court: At this time those connected with this case are excused until 1:45 o'clock this afternoon.

(At 11:45 o'clock a.m., Thursday, September 16, 1954, proceedings recessed until 1:45 o'clock p.m., Thursday, September 16, 1954.)

Seattle, Wash., Sept. 16, 1954, 1:45 o'clock p.m.

The Court: You may proceed.

Q. (By Mr. Armstrong): How did you first become acquainted with the vessel Silver Spray or Mr. Tobin? [250]

A. Through an ad in the Seattle Times. * * * * *

Q. Where did you first meet with Mr. Tobin?

A. On board the Silver Spray. * * * * *

Q. Will you tell the Court what representations were made to you about the vessel on that occasion?

A. Well, Mr. Tobin told me it was a very good, seaworthy vessel and was practically fully equipped to go tuna fishing down in San Diego, for the Van Kamp's outfit down there, and he also said they had airplane spotters to go out and spot the fish, and all we would have to do is go out and catch them, and that we would be equipped with refrigeration and bait tanks when we got to San Diego. [251]

(Testimony of William Barquist.)

Q. Did you pay him any money to obtain a working share in this vessel?

A. Not at that date.

Q. Did you at any date?

A. I did. I believe it was about the 8th of May. I give him a bank draft of \$500.00 to hold my job on the tuna clipper.

Q. How much did you eventually pay him in full?

A. When I went aboard on Tuesday, May 11th, I paid him the other \$2000.00, which totaled \$2500.00.

Q. You first went on board to work on May 11, 1954?

A. Yes.

Q. Did you move your gear and personal effects on board the vessel at that time?

A. Yes.

Q. What work did you perform prior to the time the vessel left for Alaska?

A. Well, I worked on general deck work around there, painting, cleaning up, and all sorts of things that were supposed to be done. * * * * *

Q. Was Mr. Tobin present on board during any of this period of time? [252]

A. Yes, he was there occasionally.

Q. Did he tell you at or prior to the time you signed the contract who the master of the vessel was going to be?

A. He said that he was the master and the operator and the owner. * * * * *

Q. Did he advise you as to whether there would be any people on board the vessel who were experienced tuna fishermen?

(Testimony of William Barquist.)

A. Yes, he did. There were supposed to be two experienced tuna fishermen on board or coming aboard.

Q. Did he tell you when they were going to come on board?

A. No, he didn't, but that would be before we sailed.

Q. Did you depart with the vessel to Ketchikan?

A. Yes.

Q. Was the date you left May 18th?

A. May 18th, yes.

Q. Were you requested by Mr. Tobin or any one else in charge of the vessel to consent to this voyage to Alaska? [253]

A. No, I wasn't.

Q. What occurred? How did it occur that the vessel departed for Alaska and how did you find out about it and what did you do?

A. Well, shortly before they left, Tobin said: "We are going to Alaska," and I asked him what happened to the tuna fishing trip, and that was all there was to it. We just went to Alaska. I didn't have any say about it.

Q. What services did you perform when the vessel went to Alaska?

A. I stood wheel watches and worked aboard the vessel. * * * * *

Q. What occurred at Wrangell?

A. Well, we got there about 5:30 on Sunday morning, May 23rd, I think it was, and Ed Peecher and I went up town for a cup of coffee, found a little restaurant open [254] and there was a fellow in there, and we got talking about it. He asked if

(Testimony of William Barquist.)

we come in on this vessel, and we said we did, and we told him we come up to get a load of shrimp, and we asked him if he knew anything about it. He said he knew the people that owned and operated that cold storage plant, or whatever they call it, that had the shrimp, and this man said he would call up the owner and have him come down to the vessel. Well, about an hour or so he came down to the vessel, and he informed us there was no shrimp there for us, and that he had called Seattle and said there wouldn't be no use sending a boat up for shrimp, and after he looked our boat over he said, why, we couldn't haul shrimp any way because we didn't have any refrigeration on it. * * * * * [255]

Q. When did you first discover that Mr. Tobin was not returning with the vessel to Seattle?

A. Oh, that was shortly after we got back to Ketchikan.

Q. Who informed you of this fact?

A. Well, no one in particular. I just heard that kind of via the talk around the boat.

Q. Did any one advise you as to any reason why he was not going back to Seattle with you on board the vessel? A. No. * * * * * [256]

Q. Will you tell us approximately the date of your arrival in Seattle?

A. I think it was June 3rd. * * * * *

Q. Were you on board the vessel on June 4th?

A. No, I don't believe I was, because Capt. Moore told me I might just as well go ahead and go home for a couple of days because he didn't think

(Testimony of William Barquist.)

there would be anything doing aboard the vessel.

Q. When did you return to the vessel?

A. I came down there the 5th, that was Saturday I believe, and there wasn't anything doing or no one around, [257] so I went home.

Q. Do you know whether or not on the 5th Mr. Tobin's gear was on board the boat?

A. I don't believe it was. In fact——

Q. Do you know? A. No, I don't know.

Q. Did you have occasion at any time between the 5th and the 7th to discover whether or not Mr. Tobin's gear was on board the vessel?

A. Well, I know when I took my gear off the vessel all the gear of everybody was gone.

Q. When did you take your gear off the vessel?

A. I believe that was a Sunday, June 6th.

* * * * * [258]

Q. What was the status of the supply of food and fuel, if you know, on board the vessel when it arrived from Ketchikan on the 3rd?

A. I can't say anything in regard to the fuel but I can say there was practically no food on board.

Q. Will you tell us what occurred on the 7th of June, 1954?

A. Well, my wife and I came down and we came aboard the vessel about 8:30 or 9:00 o'clock in the morning and stuck around there. Somebody said that Tobin was supposed to be there that day, and we stuck around all day long, and he didn't show up, but along about in the evening, about 7:00 o'clock I would say, he showed up.

(Testimony of William Barquist.)

Q. Did he come on board the vessel?

A. Yes.

Q. Will you tell us what Mr. Tobin said about the vessel when he came on board on the evening of the 7th?

A. Well, when Mr. Tobin came on board, I said: "What are we going to do now?" And he says: "Go up to my attorney and get your money."

Q. Who were the other people who were present at that time?

A. Well, there was my wife and myself, and Jim Gehrig was there, Don Moore, Mr. Peecher, and I think John Kadlec was there and George Helwig, the engineer. I can't [259] think of any more.

Q. Was Mr. Bunker or Mr. Herning there?

A. Mr. Herning was there throughout the day but he wasn't there that night, that evening.

Q. Did you go with Mr. Tobin to see his attorney?

A. Yes.

Q. Who else went with him?

A. My wife, Jim Gehrig, Don Moore, and I believe this is about all. Oh, Doss Payne, Doss Payne, he went, too.

Q. Who went into Mr. Swontkoski's office?

A. My wife, myself, and Mr. Gehrig.

Q. Did Mr. Tobin go into Mr. Swontkoski's office?

A. Yes.

Q. The four of you are the only ones that went in, as far as you know?

A. Yes.

Q. What was the subject of that conversation?

A. Well, we came out there because we were told

(Testimony of William Barquist.)

by Tobin we would get some money out there, but there wasn't any mention of anybody getting any money. About all that was said by Swontkoski, or whatever you call him, was that our contracts are legal and binding both ways, and that is about all my wife and I had anything to do with.

Q. When did you leave the vessel then?

A. You mean for good, to get off? [260]

Q. Yes.

A. I was back again the 8th, and I never went back any more after that.

Q. Were you ever advised after the vessel returned to Seattle that it was intended that the vessel would go tuna fishing, and when?

A. I was never advised of anything like that, but I was ready to go if it was going. * * * * * [261]

Mr. Armstrong: You may examine. [262]

Cross Examination

Q. (By Mr. Collins): Mr. Barquist, when you went to see Mr. Swontkoski you went for the purpose of trying to get back your original investment?

A. No.

Q. Did you not go to see Mr. Swontkoski to get back your original investment in the Silver Spray?

A. No.

Q. What did you go to see him about?

A. Mr. Tobin told us to come out there and we would get money. He didn't say what kind of money it was.

Q. What kind of money did you expect to get?

(Testimony of William Barquist.)

A. Well, what I expected and I think I was entitled to was money for fishing that we were supposed to do and didn't do. After all, Tobin told me when I went aboard the Silver Spray that I would make anywhere from \$7500.00 to \$12,000.00 a year, and I think I should be entitled to some of that had we gone fishing as we were supposed to.

Q. What exactly was the conversation between you and Mr. Swontkoski?

A. Well, there was very little said, because Mr. Swontkoski, he said that—about all he said was that the contract was legal and binding and there was no money to get. [263]

Q. Well, what did you say?

A. I didn't say anything. There wasn't anything to say. * * * * *

Q. Did you want your \$2500.00 back?

A. I didn't ask him for it. [264]

Q. Is that what you wanted?

A. Well, I wanted some money because I needed money. I didn't ask him for \$2500.00.

Q. But that is exactly what you wanted, your \$2500.00 back?

A. I didn't ask him for it.

Q. Is it not true that you went out to see Mr. Swontkoski to get your \$2500.00 back?

A. Well, I went out there to get money if there was any money to be had, any kind of money.

Q. You wanted your initial investment repaid, did you not?

A. I suppose if he offered it to me I probably

(Testimony of William Barquist.)

would have taken it, but the damage was done——

Q. Then that was the sole purpose of your visit to Mr. Swontkoski's office, was it not?

A. Well, I can't say it was.

Q. Did you and Mr. Swontkoski discuss prospective fishing shares in the future? A. No.

Q. You made no demand upon Mr. Swontkoski but for future fishing shares, did you?

Witness: Will you please repeat that?

(Last question is read by the reporter.)

A. No, I didn't make any demand. * * * * *

Q. You did not expect to be paid for work on the voyage to Alaska, did you?

A. Well, we went to Alaska with the intentions of making some money as far as I was told.

Q. That was later on, was it not? You expected to make money tuna fishing in California after the vessel returned to Seattle, is that right?

A. After the vessel returned to Seattle?

Q. Yes.

A. There was nothing said to me about the vessel ever going tuna fishing any more, not after my \$2500.00 was [266] invested or put in.

Q. You did sign one of these share contracts, did you not? A. Yes.

Q. Did you read it? A. Yes.

Q. Did you understand it?

A. I think I did. * * * * *

Q. Did you make any objection to the trip to Alaska?

(Testimony of William Barquist.)

A. If I would have a chance I would, but I didn't have a chance. * * * * * [267]

Q. You arrived in Seattle on June 3 about 5:30 in the morning? A. I think so. * * * * *

Q. Were you not told that you were permitted to leave the vessel for a few days while it was being drydocked for repairs?

A. Mr. Moore told me I might as well go home for a couple of days because there wouldn't be anything doing. * * * * * [268]

Q. Did you ever write to Mr. Tobin?

A. Yes. I wrote a letter to him once.

Q. To Spokane? A. Yes.

Q. Then you did know his address, didn't you?

A. Yes, but I had to trace it.

Q. When you wrote Mr. Tobin you demanded your money back, did you not?

A. Well, I was getting out of funds, and I needed money, and I wrote Mr. Tobin a nice letter asking him if he couldn't give me some money any way because I needed it.

Q. And in that letter didn't you say that you were aware that the contract provided for 90 days but wouldn't he please try to give you money immediately? * * * * * [269]

A. Yes, maybe I did.

Q. You don't deny that, do you?

A. Well, I may have. I am not going to deny it.
* * * * * [270]

Q. Now, you went aboard again on June 6?

A. Yes.

(Testimony of William Barquist.)

Q. And took your belongings off? A. Yes.

Q. What prompted you to do that?

A. Well, it looked like there was nobody around the ship ever, so I took my belongings off so nobody would come and steal them.

Q. And still made no attempt to contact any one? A. No, I didn't. * * * * *

Q. What time of the day did you go aboard the vessel on June 7?

A. June 7? I believe it was around 8:00 o'clock [271] in the morning when I was there.

Q. Accompanied by Mrs. Barquist, were you?

A. Yes, sir. * * * * * [272]

Q. You say that Mr. Tobin showed up sometime during June 7?

A. About 7:00 o'clock in the evening.

Q. And at that time you were there; your wife was there, Gehrig, Moore, Peecher, Kadlec and Helwig, is that correct? A. Yes. * * * * * [273]

Q. What did Tobin say when he came aboard on the evening of June 7?

A. Well, he just came aboard, and I asked him: "What are we going to do now?" And he says: "Well, go out to my attorney and get your money." That is all he said to me. * * * * * [274]

Q. Now then, under what circumstances, when and where and who was present, if any one was present, did Mr. Tobin fire you?

A. There was nobody fired. Tobin just never showed up at the ship, and there was nothing there to eat and so there was nothing there to stay for.

(Testimony of William Barquist.)

Q. You have just testified that he came aboard on June 7th.

A. Well, he didn't stay there very long.

Q. Well, neither did you, right?

A. Well, I had to have something to eat.

Mr. Collins: No further questions.

Cross Examination

* * * * * [275]

Q. (By Mr. Carey): In what respect, Mr. Barquist, do you claim that Mr. Tobin misrepresented anything to you in connection with this proposed venture?

A. Well, when we discussed it before I bought in, why, he told me that we would make anywhere from \$7500.00 to \$12,000.00 a year fishing tuna. That is what sold me on the idea, and he also stated that: "All the contracts we have, we will lay them up here on the table where everybody can study them and read them over and vote on them."

Q. Do you claim those were misrepresentations that you relied upon? Did you believe him, in other words?

A. Well, I don't know what else they could have been, because none of them was ever carried out.

Q. I am not asking about the carrying out end of it, but was it because of those representations he made to you that you advanced your \$2500.00?

A. Yes.

Q. And that is what you are complaining about?

A. Yes.

(Testimony of William Barquist.)

Mr. Carey: That is all.

The Court: You may step down. * * * * *

Mr. Wells: I will call Mr. Norman L. Bunker, on behalf of the libelant Bunker.

NORMAN L. BUNKER

called as a witness by and on his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Wells): Please state your full name and spell your last name.

A. Norman L. Bunker. B-u-n-k-e-r.

Q. Where do you reside?

A. Seattle, Washington, 16232 14th Ave. N.E.

Q. What is your occupation?

A. I am a ship master.

Q. As a ship master, what license or licenses do you have?

A. I hold a license for steam or motor vessels of any gross tons for any oceans.

Q. Is that is what is commonly called an unlimited master's license? A. That is right. [279]

Q. Under such license, are you qualified to navigate a vessel such as the Silver Spray?

A. I am qualified to navigate the United States.
* * * * * [280]

Q. Would you say that it was some time within the first two weeks in May that you first met Mr. Tobin? A. I believe so.

Q. As a result of that conversation, did you see

(Testimony of Norman L. Bunker.)

the Silver Spray? A. Yes, I did. * * * * *

Q. In the course of that observance of the vessel, did you have an opportunity to observe its hold capacity? A. I did. * * * * * [281]

Q. What is the tonnage capacity of the hold?

A. The hold, as I stepped it off, was 2880 feet, which would be 72 tons at 40 cubic feet to the ton. * * * * * [282]

Q. Please tell the Court what was said by Mr. Tobin and by you with reference to employment of you aboard the vessel Silver Spray on June 2, 1954 in Mr. Tobin's room at the Edmond Meany Hotel.

A. Well, I told Mr. Tobin that I understood that he required a navigator aboard the vessel. He said he did. I asked him whether he would be willing to take me, and he said he would be glad to have me, as I recall, and we discussed various aspects of the venture. [283]

Q. What was the nature of the venture being discussed? A. Tuna fishing.

Q. Was it stated to you out of what port the tuna fishing venture would take place?

A. San Diego.

Q. Was it stated when that venture would commence?

A. I understood that the vessel was up in Alaska and was returning, and it would be back within a matter of almost hours, and I assumed that as soon as fuel and stores were taken on board, the vessel would leave. Mr. Tobin told me that the vessel had been gone for several days, weeks, rather, and that

(Testimony of Norman L. Bunker.)

he felt that the crew would appreciate having a couple of days ashore.

Q. Were any statements made to you with reference to the use of the vessel in the service of any particular fishery or cannery organization?

A. Yes. I was told that Mr. Tobin had a contract with Van Kamp's to fish tuna; that this was very good because Van Kamp's was going to provide an airplane which would help in the search of tuna.

Q. Have you ever had any commercial fishing experience? A. None.

Q. I want to ask you again, particularly, was there a statement made to you on June 2 at Mr. Tobin's hotel room [284] as to when the vessel would depart Seattle?

A. The impression that I received was that upon the arrival of the vessel, it was prepared to go fishing, other than the matter of giving the crew a couple of days of shore leave to visit their families. I myself was under the impression that it was only a matter of taking stores and fuel and we would depart.

Q. Were any statements made to you with reference to equipping the vessel with bait tanks or refrigeration?

A. Yes. I understood when the vessel arrived at San Diego the vessel would be fitted with bait tanks and with refrigeration.

Q. Who made those statements to you?

A. Mr. Tobin. * * * * * [285]

(Testimony of Norman L. Bunker.)

Q. During that period of time was the matter of return from your employment discussed?

A. Yes.

Q. What was said?

A. Mr. Tobin said that I could be assured of a good living, and my wife inquired as to what he considered a good living, and he replied from \$7500.00 up to some other figure, that I don't recall, the latter one.

Q. As a result of this conversation and your knowledge of the vessel, were you offered the position of navigator aboard this vessel?

A. I was.

Q. Did you accept the same? A. I did.

* * * * * [286]

Q. During the day following June 2, did you receive any instructions relative to your employment aboard the vessel Silver Spray?

A. On the evening of June 2 I was advised that the boat would be in the following day and that I should go down on that day, on the next day, and relieve Mr. Moore.

Q. Who gave you these instructions?

A. Mr. Tobin.

Q. That was on the 2nd?

A. That is on the evening of the 2nd, yes.

Q. Did you go to the Silver Spray?

A. The following day, late in the afternoon, [287] about 5:00 p.m., I went aboard the vessel.

Q. What did you do when you got aboard the vessel?

(Testimony of Norman L. Bunker.)

A. I went aboard for two reasons: One——

Q. What did you do when you got there?

A. I asked Mr. Moore to show me how some of the equipment that I was not familiar with operated, and I looked around the vessel to see what equipment was there and what equipment would be needed for the proposed trip.

Q. Are you talking particularly with reference to navigational equipment? A. That is true.

* * * * * [288]

Q. Were there any conversations with Capt. Moore or Mr. Gehrig relative to the movement of the vessel to drydock?

A. Yes. I suggested to Mr. Tobin and to Mr. Gehrig, as I recall—this was on a Friday, I believe—that rather than put the vessel in a drydock on a Saturday and Sunday and incur added expense, due to overtime for the mechanics, that we wait until Monday before drydocking.

Q. You made the suggestion to Mr. Tobin?

A. As I recall, the three of us discussed it.

Q. In the hotel room or where?

A. At about 8:00 or 9:00 o'clock in the evening in the Edmond Meany Hotel, Mr. Tobin, Mr. Gehrig and myself became aware that the vessel had had an accident, and—— * * * * * [289]

Q. Were you so advised by Mr. Gehrig on this occasion when you and he and Capt. Moore were discussing this, were you so advised by Mr. Gehrig that you could return home? A. Yes.

Q. And did he also at that time advise you he

(Testimony of Norman L. Bunker.)

would call you when your special services were needed? A. Yes.

Q. Did you return to your home? A. I did.

Q. Did he subsequently call you?

A. Not that I recall.

Q. Did you attempt to call him?

A. On many occasions.

Q. Did you succeed in reaching him?

A. Eventually.

Q. When was that, the day, sir?

A. I believe that was about June 10.

Q. What was said by Mr. Gehrig to you on that occasion?

A. Mr. Gehrig told me that the vessel had been attached; that he was no longer the representative for Mr. Tobin; that Mr. Tobin was represented by Mr. Swontkoski.

Q. Have you seen Mr. Tobin between June 2nd or 3rd [291] and now until he arrived in the court room? A. No.

Q. Did you go and see Mr. Swontkoski?

A. I did.

Q. What did Mr. Swontkoski say to you?

A. He told me Mr. and Mrs. Lower had placed a lien on the vessel, and I asked Mr. Swontkoski if Mr. Tobin was going to lift the lien.

Q. Did he respond to that question?

A. To that particular question I don't recall; I don't recall what he said in response.

Q. On June 3 and the days following, did you

(Testimony of Norman L. Bunker.)

regard yourself in the employ of the vessel Silver Spray? A. I did.

Q. Did you hold yourself available to serve aboard her whenever ordered and requested to do so? A. I did. * * * * * [292]

Mr. Wells: That is all the questions I have.

Cross Examination

Q. (By Mr. Collins): Mr. Bunker, as far as you know then, on June 2nd Mr. Tobin had every intention of taking the Silver Spray tuna fishing?

A. That is correct.

Q. Did you discuss jig fishing as well as live bait fishing?

A. Frankly, I wouldn't know what jig fishing was. We discussed live bait.

Q. Didn't you get the impression that Mr. Tobin didn't know anything about tuna fishing?

A. Mr. Tobin told me that he had fished salmon for [295] several years and that he had been making a study of the life habits of tuna fish.

Q. Well, isn't it true then that both of you were more or less groping on a new and untried venture?

A. I believe the trade name is we were both green beans.

Q. You did sign one of these fishing contracts?

A. That is true.

Q. And you understood the purport of the contract? A. That is true.

(Testimony of Norman L. Bunker.)

Q. For what reason did you call Mr. Swontkoski?

A. I called on Mr. Swontkoski to endeavor to find out what Mr. Tobin was going to do to lift the lien.

Q. Did you discuss the \$1500.00 you paid Mr. Tobin?

A. I think at the termination of the conversation I told Mr. Swontkoski to consider this as a formal request for the return of the \$1500.00.

The Court: Will you state how much money in all you paid on account of this transaction?

Witness: I gave a check for \$1500.00 and a promissory note payable within 90 days for \$1000.00.

Q. (By Mr. Collins): You have never been actually fired by Mr. Tobin?

A. No. I have been abandoned by Mr. Tobin.

Mr. Collins: I have no further questions.

* * * * * [296]

Cross Examination

Q. (By Mr. Carey): How long have you been a seafaring man? A. 27 years.

Q. Without going into all the details, I assume you started in as deck hand and worked up to master? A. As deck boy, yes.

Q. With unlimited license?

A. Yes, that is right.

Q. And while you have never been on a fishing expedition, your experience in seafaring affairs has

(Testimony of Norman L. Bunker.)

enabled you to know that fishing is an uncertain enterprise, isn't that correct?

A. Yes, an element of chance.

Q. That nobody in, say, the month of April or May or June of any one year can tell or predict or prophesy [297] how many fish are going to run in July, August or September?

A. I believe they can average it out.

Q. Why do you think so?

A. Fish that are caught are a matter of record, and you can average out any record.

Q. Is it your idea that a man who has had no more fishing experience than Mr. Tobin could predict what the catch of tuna would be in any given year?

A. I believe so if he made a study of tuna; he should be able to tell you what you would make in a given year. The statistics should be there.

Q. Did you believe his prediction?

A. I believed him.

Q. And as result of that, was that the reason you put your money up? A. Yes.

Q. And do you think he misled you, deceived you?

A. He deceived me in some respects, yes.

Q. And that is what you are complaining about?

A. No.

Q. What are you complaining about?

A. I am complaining about the fact that Mr. Tobin wrongfully discharged me or abandoned me, and I am now seeking redress for that. * * * * *

(Testimony of Norman L. Bunker.)

Q. During that 13 days, had you performed any services aboard the boat as navigator?

A. Yes.

Q. What?

A. I observed the equipment of the vessel. I saw what was needed in the way of periodicals, charts, equipment, chronometers, tide tables, parallel rulers, dividers, etc. [301]

Q. And how long did that take you?

A. Took me about a matter of an hour and a half to two hours.

Mr. Carey: That is all. * * * * * [302]

JOHN KADLEC

called as a witness by and on his own behalf, having been previously sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Crutcher): Your name is John Kadlec? A. Yes.

Q. And you have previously testified in this case? A. Yes.

Q. Mr. Kadlec, you have previously testified as to the circumstances of your meeting the respondent and as to your employment aboard the vessel Silver Spray. Would you advise the Court as to the date when you left the Silver Spray, that is the last day you reported aboard her?

A. June 4.

Q. Have you received any compensation from Mr. Tobin or from his agent or from the master

(Testimony of John Kadlec.)

for the work which you performed aboard the Silver Spray?

A. Just the \$5.00 I received in Ketchikan.

Q. That was the \$5.00 to which you previously testified? A. Yes.

Mr. Crutcher: I have no further questions. [305]

I wish to introduce on behalf of Mr. Kadlec the testimony which he previously gave in support of the Lower case, and I wish to now move to amend the libel of Mr. Kadlec to conform to the proof, and I wish Mr. Collins to be permitted to cross examine upon that issue, that is, the issue presented by the pleadings, without reference to the scope of the direct examination which has just been made.

Mr. Collins: Your Honor, I make the objection because it is absolutely contrary and different than Mr. Kadlec's initial libel.

(Argument.)

The Court: The objection is overruled. The motion for such trial amendment is granted, and you may cross examine the witness further if you wish.

Cross Examination

Q. (By Mr. Collins): Mr. Kadlec, you did not sign a share agreement on the Silver Spray, is that correct? A. That is correct.

Q. You negotiated with Mr. Tobin for a share in the Sockeye, is that correct?

A. On the Sockeye and/or the tuna boat.

Q. Well, you signed an agreement with Mr. Tobin [306] on the Sockeye, did you not?

(Testimony of John Kadlec.)

A. I signed on both of them, sir.

The Clerk: Respondents' Exhibit A-10.

(Contract (Kadlec) marked Respondents' Exhibit A-10 for identification.)

Q. (By Mr. Collins): You have before you a typewritten document dated April 14th and marked for identification as Respondents' Exhibit A-10. Is that your signature on that document?

A. Yes.

Mr. Collins: I offer it in evidence.

Mr. Crutcher: No objection.

The Court: Admitted.

(Respondents' Exhibit A-10 received in evidence.)

Q. (By Mr. Collins): Now referring to the document, Mr. Kadlec, does it not say you are purchasing a share on the Sockeye?

A. On the Sockeye or a tuna boat.

Q. Will you kindly read the language?

A. (Reading) "In consideration of the sum of \$1500 - \$500 dn. paid by the second party the first party [307] agrees to sell one working share in the fishing boat Sockeye or tuna Boat, owned by the first party."

Q. At that time you did not have any operational interest in the Silver Spray, did you?

A. Just Mr. Tobin's word.

Q. Mr. Tobin did not own the Silver Spray as of April 14, did he?

(Testimony of John Kadlec.)

A. He was planning on purchasing this boat.

Q. You did some work on the Sockeye, did you not? A. A little off and on.

Q. Well, how much did you do?

A. It wouldn't amount to much. I don't know exactly how much it was, probably an hour or so.

Q. Under what circumstances do you claim Mr. Tobin promised to pay you \$100.00 a week on the Silver Spray?

A. Mr. Tobin promised me if I went on the tuna boat, Silver Spray, that I would work for \$100.00 a week.

Q. When was that?

A. On April 14th.

Q. Was any one present? A. No.

Q. Did you tell any one that you claimed wages on the Silver Spray?

A. I told Mr. Swontkoski.

Q. Later on, after the Silver Spray came back, you [308] went out and talked to Mr. Swontkoski, is that right? A. Yes.

Q. Did you then claim that Mr. Tobin owed you \$100.00 a week on the Silver Spray?

A. I told Mr. Swontkoski the words in effect—we talked about the wages of my previous employment, based on a five day week.

Q. Is not this the fact: That you told Mr. Swontkoski that you were entitled to only \$150.00 for wages for your work on the Sockeye, and that you were entitled to your \$500.00 back from Mr. Tobin which you invested in the Sockeye? A. No.

(Testimony of John Kadlec.)

Q. And you had no conversation with any one concerning this so called wage agreement?

A. I don't follow you, sir. Who are you talking about?

Q. I say you had no conversation on board about the so called wage agreement? A. No.

Q. Why didn't you tell your lawyer then when you intervened in this case?

A. I didn't feel it was necessary, sir.

Q. Do you mean to say you thought you were under a wage contract with Mr. Tobin, and at the time you intervened in this action it was unnecessary to tell your lawyer about it? [309]

A. Yes.

Q. That was Mr. Wells, was it not?

A. Yes.

Q. And with your consent, Mr. Wells formally withdrew as your counsel?

A. No, it wasn't that, sir. I don't know why Mr. Wells withdrew.

Q. I am not asking you for any conversation with Mr. Wells because they are privileged. I would like to know, though, how it was that if you had a binding wage contract with Mr. Tobin that you did not tell your lawyer about it for the purposes of this suit and brought it up in the last few days for the first time.

Mr. Crutcher: I object to that statement for the reasons it is not a question and counsel is obviously attempting to elicit a confidence between client and attorney.

(Testimony of John Kadlec.)

The Court: The objection is sustained.

Mr. Collins: I have no further questions.

Cross Examination

Q. (By Mr. Carey): Mr. Kadlec, was it yesterday you were on the stand before?

A. Yes. [310]

* * * * *

Q. Isn't it a fact that yesterday you said you had no discussion with Tobin at all about going on the trip to Alaska? A. I didn't.

Q. If you had no discussion with Tobin about going to Alaska, how could it possibly be that you and he agreed on \$100.00 a week while on the trip to Alaska? [312]

A. I don't know that, sir. The fact is that I learned from the other men on board that we were going to Alaska.

Q. My question is if you had no discussion with Tobin about going on the trip to Alaska, how can it possibly be that you had an agreement with him to pay you \$100.00 a week while on that trip. Can you answer that?

A. Sir, I didn't care where the boat went as long as my wages went on.

Q. That is the only answer you can make, is it?

A. Yes.

Mr. Carey: That is all.

Redirect Examination

Q. (By Mr. Crutcher): Mr. Kadlec, when was

(Testimony of John Kadlec.)

the conversation with Mr. Tobin in which he mentioned the figure of \$100.00 a week for working on the Silver Spray?

A. At the Edmond Meany Hotel, April 14.

Q. At that time did Mr. Tobin tell you he owned the Silver Spray? A. Not at that time.

Q. At that time he told you he owned the Sock-eye? A. Yes.

Mr. Crutcher: I have no other questions. [313]

The Court: Step down.

(Witness excused.)

The Court: Call the next witness. [314]

* * * * *

Mr. Crutcher: At this time, may it please the Court, the intervening libelants and the libelant, who are crew members, rest their case in chief.

Mr. Carey: For the record, Your Honor, for the same reasons already stated, namely, the objection on the ground of lack of jurisdiction, I move to dismiss the original libel of Lower and all the intervening libels, other than the mortgagees, of course, upon the ground that whatever the pleadings may have been, the evidence now before the Court, and that is controlling, definitely shows that the only cause of action is one for deceit, not within the jurisdiction of the Admiralty Court.

The Court: The motion is denied.

Mr. Collins: Respondent Tobin now moves to dismiss all libels upon the ground that they do not state a cause of action against the vessel in partic-

ular or against Mr. Tobin personally in this particular proceeding. [315]

(Argument.)

The Court: The motions are denied with leave, in each instance, for their being renewed at the close of all the evidence.

(Discussion.)

The Court: The opportunity of proving the intervening libel of the intervenors Putnam and Overman, the mortgagees, is reserved to them until after the respondents' case in chief, and Mr. Carey is permitted, therefore, to produce their case out of order in that manner.

You may proceed with the respondents' case in chief.

Mr. Collins: I will call Mr. Swontkoski.

JOSEPH F. SWONTKOSKI

called as a witness by and on behalf of respondents, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Collins): Your full name, please?

A. Joseph F. Swontkoski—S-w-o-n-t-k-o-s-k-i.

Q. Your profession, please?

A. I am an attorney at law.

Q. At one time did you represent Mr. Tobin in connection with the Silver Spray? A. I did.

Q. Are you willing to waive the privilege of communication between attorney and client?

A. Yes.

(Testimony of Joseph F. Swontkoski.)

The Court: Is the client also willing?

Mr. Collins: I think Mr. Tobin should be sworn so I may ask him that one question.

The Court: You may rise and be sworn.

ROBERT J. TOBIN

called as a witness by and on his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Collins): Mr. Tobin, do you understand that conversations between an attorney and his client are privileged unless waived by the client?

A. Yes. [317]

* * * * *

Q. You are willing to waive your privilege as to any conversations or discussions? A. Yes.

Mr. Collins: That is all.

(Witness excused.)

JOSEPH F. SWONTKOSKI

called as a witness by and on behalf of respondents, having been previously sworn, was examined and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Collins): Did you have occasion to talk with Mr. Kadlec? A. Yes, sir. [318]

* * * * *

(Testimony of Joseph F. Swontkoski.)

Q. What was the conversation?

A. My best recollection is that Mr. Kadlec came to [319] my office and inquired whether he could get his money for wages from Mr. Tobin. I asked him how much the wages were and he said \$150.00, about three weeks' wages due. My recollection further is that this did not relate to the Silver Spray. I was at that time aware of the matter of the Sockeye, having discussed it with Mr. Tobin who was then my client, and I could not then advise him whether or not he would be paid, but he was then willing to waive his claim of \$500.00 on the Sockeye in payment for \$150.00. That is my best recollection. He informed me that he then had an attorney, at which point I ceased discussing the matter with him.

Q. Did you then inform Mr. Tobin of that conversation?

A. I wrote him a letter recounting what had happened since the last time I saw him. It would be the next day, as a matter of fact.

Q. Did Mr. Kadlec make any claim with respect to the Silver Spray at all?

A. Not to my recollection, sir.

Mr. Collins: You may examine.

Cross Examination

Q. (By Mr. Crutcher): Mr. Swontkoski, in this conversation with Mr. Kadlec, you say that the discussion of wages related solely to the Sockeye, is that correct? [320]

(Testimony of Joseph F. Swontkoski.)

A. Yes, sir, that is my best recollection of it.

Q. There was no discussion at that time as to any claim which he might have for wages on the Silver Spray?

A. No, sir.

* * * * *

Q. What did you do further with respect to the wage claim which Mr. Kadlec gave you of \$150.00 on the [321] Sockeye? You referred it to Mr. Tobin, I believe you said. Did you thereafter take any action with respect to that claim?

A. No, sir. I merely advised my client as to what had taken place, as to his rights. In other words, this letter that I referred to was an extensive letter on the whole discussion of his fishing venture, just brought him up to date. I mentioned that in one of the paragraphs.

Mr. Crutcher: I have no other questions.

Mr. Collins: No further questions.

The Court: Step down.

(Witness excused.)

ROBERT J. TOBIN

called as a witness by and on his own behalf, having been previously sworn, was examined and testified further as follows: * * * * * [322]

Direct Examination—(Continued)

Q. (By Mr. Collins): Your name is Robert J. Tobin?

A. Yes.

Q. Where do you live, Mr. Tobin?

A. 3717 East Cleveland, Spokane, Washington.

Q. How long have you lived in Spokane?

(Testimony of Robert J. Tobin.)

A. Over a year.

Q. Prior to your participation in the Silver Spray, what was your occupation?

A. I was working on the railroad.

Q. At what wage?

A. Approximately \$500.00 a month. [323]

* * * * *

Q. When did you come in contact with the Silver Spray?

A. It was at Fisherman's Wharf. I was there with a Jack Flagler who has a commercial boat company I believe, and Mr. Overman come up and asked Mr. Flagler if the charter had come through on the boat. They were anticipating some kind of a charter or something, and Mr. Overman invited me over to see a nice boat. When I seen the boat, I was thrilled with the boat. I mean it was something, and we talked further on it, met further on it, and we came to a written agreement, giving the lien I had in the Sockeye as security until I got hold of \$5,000.00, and then title would be turned over to me or a mortgage. [324]

* * * * *

Q. How long prior to April 28 did you first start to negotiate with Putnam and Overman?

A. I don't recall. It was a few days before. It was either one or two days before the signing of the purchase agreement.

Q. How long before the mortgage was the purchase agreement?

A. A couple of weeks, three weeks I guess. I

(Testimony of Robert J. Tobin.)

had until June 1st to get the mortgage, but I picked it up and got it cleared with the money I received from the shareholders.* * * * * [325]

Q. When did you come in contact with Kadlec?

A. Mr. Kadlec answered—I was trying to—endeavoring to get shareholders for a trolling boat. Mr. Kadlec answered an ad in regards to that in which he wanted to go aboard it as an investment.

Q. To which vessel did that pertain?

A. The Sockeye.

Q. Did Mr. Kadlec pay you money?

A. Yes, \$500.00.

Q. What is your response to his wage claim on the Silver Spray?

A. He has no wage claim. There was no wage agreement whatsoever. As a matter of fact—

Q. Did you have any discussion with Mr. Kadlec about the Alaska voyage?

A. Yes, I believe I did. I don't know what it was though. There were so many discussions. I don't know at this time. He was in full knowledge that we were going to [326] Alaska to take this cruise.

Q. What was his attitude about going?

A. Wonderful. * * * * *

Q. How did you get in contact with Mr. Bunker?

A. Mr. Bunker answered the same ad in regards to Alaska fishing, and consequently the talk I had with him that—now, I could be wrong. I don't know, but I believe he answered the ad in regards to Alaska fishing, and I told him of my inexperience and I needed a master.

(Testimony of Robert J. Tobin.)

Q. Just a moment. When did you contact Mr. Bunker? * * * * * [327]

A. June 2, I believe. * * * * * [328]

Q. How was the meeting arranged?

A. Through Mr. Gehrig. * * * * *

Q. What did you talk about?

A. We talked about the tuna venture, about the possibilities of the boat coming back later and used for an excursion boat in Alaska, which would be a more sound basis for a livelihood out of it.

Q. What did you tell him of your fishing experience? * * * * *

A. I told him I had one year trolling experience, or one season, in Alaska.

Q. Did you discuss the terms of the contract in detail? [329] A. Yes, sir. * * * * * [330]

Q. Did you talk about the risks of tuna fishing?

A. Yes, sir, we did.

Q. What did you say and what did he say?

A. My conversation was that it was a gamble. Mr. Bunker's conversation was this: He said: "I am reckless with my own money, but I am very careful with other people's money," and he said: "I like to gamble."

Q. Did you discuss the Van Kamp Company?

A. What I knew of it.

Q. What did you and Mr. Bunker talk about with respect to the Van Kamp Company?

A. With respect to selling our fish to Van Kamp.

Q. Did you tell him you had a contract with Van Kamp?

(Testimony of Robert J. Tobin.)

A. No, sir, I didn't.

Q. Did you have a contract with Van Kamp?

A. No, sir, I didn't.

Q. How did you hear about the Van Kamp Company?

A. From booklets on the boat, which they took one themselves. * * * * * [331]

Q. How did you get in contact with Mr. Herning?

A. He answered an ad in regards to tuna fishing.

Q. Will you take out Mr. Herning's contract?

A. I have it here.

Q. What is the date of that?

A. 27th day of April.

Q. With respect to that date, when did you first see Mr. Herning?

A. I believe it was two days before. * * * * *

Q. Did you talk to Mr. Herning on board the Silver Spray?

A. Yes, I did.

Q. About two days before April 27?

A. Yes.

Q. Did you discuss tuna fishing?

A. Yes.

Q. What did you tell him about your proposed venture, and what did he tell you?

A. I told him, explained to him, that I had just gotten, had just bought the boat, that I knew nothing about [333] the boat. It was the biggest boat I had ever been on in my life. I knew nothing about diesel engines. He said he knew diesel engines and told me of his experiences in Alaska fishing, and I was very impressed by Mr. Herning because I be-

(Testimony of Robert J. Tobin.)

lieved he had a lot of knowledge that would help me in a venture I knew nothing about. * * * * *

The Court: We will have to continue proceedings until tomorrow morning. The Court is adjourned until tomorrow morning at 10:00 o'clock.

(At 4:30 o'clock p.m., Thursday, September 16, 1954, proceedings recessed until 10:00 o'clock a.m., Friday, September 17, 1954.) [334]

Seattle, Wash., Sept. 17, 1954, 10:00 o'clock, a.m.

The Court: You may proceed.

Q. (By Mr. Collins): Mr. Tobin, will you direct your attention to Mr. Herning's contract? Do you have it before you? A. Yes, sir.

Q. What is the date of it?

A. The 27th of April, 1954.

Q. Mr. Herning made the Alaska trip with you?

A. Yes, he did.

Q. Will you direct your attention to Mr. Peecher's contract? What is the date of that contract?

A. His is the 4th day of May, 1954.

Q. How did you come in contact with Mr. Peecher?

A. In response to an ad in the paper.

Q. Where did you meet him?

A. He came to the boat.

Q. How did you arrange the meeting?

A. I left a phone number at Fisherman's Wharf, Room 211.

Q. With reference to May 4, when did you first talk to Mr. Peecher? [335]

A. Several days before.

(Testimony of Robert J. Tobin.)

Q. Did you tell Mr. Peecher you were an expert tuna fisherman? A. No. * * * * *

Q. What did you and Mr. Peecher talk about on your first meeting?

A. As near as I recall, our conversation was in regard to the boat; if the boat wasn't successful fishing, we would use it for freight or charter. It had tremendous possibilities. Mr. Peecher told me that if we went into freight and that end, he knew how to handle all the lines, take care of all the cargo, and——

Q. What representations, if any, did you make to Mr. Peecher, regarding a contract with Van Kamp Company? A. None whatsoever.

Q. Did you talk about Van Kamp at all?

A. Yes, we talked about Van Kamp.

Q. What was the conversation?

A. Well, I hoped to fish for Van Kamp. * * * * *

The Court: If in doing so, you are stating the substance of what you said and what he said.

A. Well, there were varied discussions. One was Van Kamp. One was Honolulu. Which would be the best fishing and the place to go.

Mr. Collins: Your Honor, this may be irregular but I think it is important. Due to the fact that the replies to Mr. Tobin's affirmative defenses which came in, the last one on the day previous to the trial, now allege fraud and misrepresentation by Mr. Tobin, I had Mr. George Bender, a certified public accountant, go through all of the Silver Spray vouchers. He has made a full accounting of

(Testimony of Robert J. Tobin.)

the receipts and disbursements of the funds paid him by the libelants. If in order, I would like to put Mr. Bender on the stand. * * * * * [337]

The Court: You may step down temporarily.

(Witness excused temporarily)

The Court: You may inquire of this witness up to the point where objection is made, and then I will hear the objection and give to the one making it the opportunity to state the objection.

The Clerk: Respondents' Exhibit A-11.

(Receipts and Disbursements marked Respondents' Exhibit A-11 for identification.)

GEORGE D. BENDER

called as a witness by and on behalf of respondents, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Collins): Your name, please.

A. George D. Bender.

Q. What is your profession, Mr. Bender?

A. Certified public accountant. * * * * *

Q. Mr. Bender, at my request, did you examine the vouchers pertaining to the expenditures on the Silver Spray? A. I did.

Q. Were you given the complete records of the Silver Spray, as far as you know?

A. As far as I know, it was complete, yes.

* * * * * [339]

(Testimony of George D. Bender.)

Q. (By Mr. Collins): You have before you, Mr. Bender, Respondents' Exhibit A-11 for identification. Will you identify that?

A. It is the report that I prepared. It is entitled "Receipts and Disbursements Statement, Robert J. Tobin, operating Silver Spray Fishing Vessel".

Q. Made in accordance with all of the vouchers which Mr. Tobin submitted to you and made in accordance with the information he gave you orally?

A. That is correct.

Mr. Collins: I offer Respondents' A-11.

Mr. Crutcher: We object to its admission. We see no relevance to this——

(Argument.) * * * * * [346]

The Court: You may, on voir dire, interrogate on that point as to whether or not the data in its original form submitted to him is voluminous or intricate or involved and hard to understand by a layman, matters of that sort.

Voir Dire Examination

Q. (By Mr. Crutcher): Mr. Bender, at the time you prepared this statement, did you have before you a systematic set of records of any sort?

A. I had just a little brown-backed memorandum book in which Mr. Tobin had listed the moneys received and paid out. It was in this file (indicating). I imagine it is still here.

The Court: That ought to be available for cross examination when that time comes.

(Testimony of George D. Bender.)

(Witness removes brown note book from file.)

The Court: Is that it?

Witness: Yes.

The Court: Is that the original record, the only original record, submitted to you?

Witness: That is correct.

The Court: Is there any objection to marking [347] it for identification?

Mr. Collins: No, Your Honor.

The Clerk: Respondents' Exhibit A-12.

(Brown Note Book marked Respondents' Exhibit A-12 for identification.) * * * * *

Q. (By Mr. Crutcher): Did you examine any cancelled checks? A. No.

Q. Did you examine any receipts from the vendees themselves?

A. Well, not other than the bills that are in the files here.

Q. How many of the items in your schedule of disbursements are supported by such vouchers?

A. Well, the majority of the items in there. I [348] would say substantially all of them are supported by little cash register tickets or invoices, which I have here.

The Court: Well, bring them out, too. I want to bring out all of the original record sources submitted to you and considered by you when you were making up Respondents' Exhibit A-11.

(Witness hands pouch to Clerk.)

Q. (By Mr. Crutcher): While those are being marked for identification, did you in your capacity

(Testimony of George D. Bender.)

as a certified public accountant determine that the expenditures shown in this list were made for the purpose of operation of the Silver Spray?

A. They were all brought in to me with the explanation that those were the expenses for the Silver Spray, and I treated them as such.

Q. Will you answer the question? * * * * * [349]

A. No. I didn't have any way of determining whether they were Silver Spray or what they were.

Q. Did you make any inquiry of any person shown on this list as a payee as to whether he had received such a payment? A. No.

Q. Did you make any audit, in the customary sense of that term, whatsoever?

A. Not an audit. It was just merely a listing of Mr. Tobin's disbursements.

Q. This, then, is simply a summary of the disbursements as shown to you by Mr. Tobin?

A. That is correct.

Mr. Crutcher: I have no other questions.

* * * * * [350]

The Clerk: Respondents' Exhibit A-13.

(Folding Pouch marked Respondents' Exhibit A-13 for identification.)

The Court: The Court has before it Respondents' Exhibit A-13, which is a number of vouchers said by the witness to have been given to him—I am not sure he expressly said so—but A-13 was produced by the witness now on the stand in response to some question about where were the other source mate-

(Testimony of George D. Bender.)

rials. Further inquiry might be made on that point as to what these A-12 and A-13 are.

Mr. Crutcher: I believe he has said sufficient on that now to establish that A-11 prepared by Mr. Bender is nothing more than a list of matters provided to him by Mr. Tobin and as such has no evidentiary value in any court.

(Argument.)

The Court: The ruling is that the objection to Respondents' Exhibit A-11 is sustained. [351]

(Respondents' Exhibit A-11 rejected.)

Mr. Collins: May Mr. Bender be excused?

The Court: Mr. Bender may be excused.

(Witness excused.) * * * * *

ROBERT J. TOBIN

called as a witness by and on his own behalf, having been previously sworn, was examined and testified further as follows:

Direct Examination—(Continued)

* * * * * [352]

Q. (By Mr. Collins): Mr. Tobin, you admit receiving various sums from Mr. Bunker, Mr. Herning, Mr. Peecher and Mr. Barquist? A. Yes.

* * * * * [353]

Q. What did you do with the money?

A. I used it to outfit and operate the Silver Spray.

Q. Did you use any part of that money as a down payment on the Silver Spray? [354]

(Testimony of Robert J. Tobin.)

A. \$5,000.00 of it. * * * * *

Q. You are talking about spending the \$11,500.00, are you not, Mr. Tobin?

A. Yes, I am.

Q. That is the money invested by these people?

A. Yes.

The Court: That is sufficient.

Q. When did you put the vessel in drydock after it came back from Alaska?

A. I am not quite sure of the date. It was after the 7th.

Q. How much was that bill? A. \$365.00.

Q. Did you pay the bill? A. Yes. * * * * *

Q. Did you use any of these funds for your residence in Spokane? A. No, sir, I didn't.

Q. How did you maintain your home in Spokane? A. I borrowed \$2,000.00 in Spokane.

Q. In order to engage in this enterprise?

A. Yes, sir.

Q. Do you still owe that money?

A. Yes.

Q. Do you recall how much you paid the Pacific Fishing & Trading Company? [356]

A. \$200.00 and some dollars. I am not sure.

The Court: That was for what?

Witness: Food, provisions for the boat.

Q. (By Mr. Collins): Who were the legal fees paid to?

A. Mr. Swontkoski and Mr. Arthur Hanson in Spokane. * * * * *

Q. Did you use this \$11,500.00 in its entirety

(Testimony of Robert J. Tobin.)

to pursue your operation with the Silver Spray?

A. Absolutely. * * * * * [357]

Q. Do you have the contracts before you, Mr. Tobin? A. Yes.

Q. Please direct your attention to Mr. Peecher's contract. Now, the date of that contract is what?

A. May 4, 1954.

Q. Did Mr. Peecher go on the Alaska trip with you? A. Yes, he did.

Q. Willingly? A. Yes, sir. * * * * * [359]

Q. What was your explanation for the voyage?

A. For one thing, we were having a lot of engine trouble. I wasn't sure of the craft. I had never been out in it except to Port Townsend. We were approached by Shell Fish Incorporated and asked if we wanted to haul shrimp from Alaska under contract. Everybody concerned discussed the contracts, and I heard no more from them for a few days. The shareholders asked me: "What has become of Shell Fish Incorporated?" So we decided to take a shake-down cruise. The first night out Shell Fish Incorporated called us on the phone, on the radio, told us to pick up 100,000 lbs. of shrimp at Wrangell and Petersburg. We were in contact with them every night on the radio, and every shareholder heard them and listened to the conversation. When we arrived in Ketchikan, Mr. Rude called me on the phone, and he said: "Mr. Tobin, do you want a contract or do you just want to haul one trip?" I said: "We will take one trip out." I asked him to send me a wire, which he did, stating to pick [360] up 100,-

(Testimony of Robert J. Tobin.)

000 lbs. of shrimp, and the money would be deposited with—I believe it was—the Seattle National Bank—I don't recall. I then had the boat refueled, gave the wire to Mr. Lower, and they proceeded to Wrangell. When they arrived at Wrangell, they were informed—— * * * * *

Q. When did you leave this vessel?

A. I believed we arrived May 21st. I am not sure. That is the morning I left the vessel at Ketchikan.

Q. Did you talk with any of the shareholders about your departure?

A. Not at that time. I stayed in Ketchikan until the boat returned from Wrangell.

Q. I am directing your attention to your departure from Alaska?

A. Yes. I had conversations with Mr. Lower.

Q. Anybody else?

A. I believe every shareholder, Bill Barquist, for one.

Q. What did you tell them?

A. Mr. Lower was my—and Capt. Moore—were my main conversation about my leaving for Seattle—and Mr. Peecher.

Q. What reason did you give them for leaving?

A. To try to collect the money from Shell Fish Incorporated on sending us to Wrangell for shrimp and none for the boat when it arrived.

Q. You came back with Mr. Payne, was it?

A. Mr. Peecher.

(Testimony of Robert J. Tobin.)

Q. Why did Mr. Peecher leave the vessel, if you know?

A. Mr. Peecher's hands were swollen, and he felt very ill. * * * * * [362]

Q. What conversations did you have with Mr. Peecher, if any, relating to his withdrawal as a shareholder from the Silver Spray?

A. I told Mr. Peecher I would replace his share as fast as I possibly could.

Q. What did he tell you about it?

A. Well, he said: "That is fine, Bob." He said: "I don't want any trouble, and all I want is a quiet settlement." * * * * *

Q. Do you have Mr. Barquist's contract there?

A. Yes, I do.

Q. What is the date of it?

A. 4th of May, 1954, William and Mary Barquist.

Q. With respect to the date of May 4, when did you first see Mr. Barquist?

A. Three or four days previous. * * * * *

Q. Now, I am directing your attention to that first meeting. What did you tell Mr. Barquist and what did he tell you?

A. I explained to Mr. Barquist that we could fish, freight or charter. The boat could be very versatile. I told him I had a \$30,000.00 mortgage. I don't remember that [364] day whether he seen the mortgage. He seen the mortgage. I showed it to him. And he asked me for a copy of the contract.

* * * * * [365]

(Testimony of Robert J. Tobin.)

Q. On the vessel's return voyage, did you get a ship-to-shore call when the ship was out in the Sound?

A. I called the ship the night before it arrived.

* * * * * [367]

Mr. Collins: Capt. Moore is now in the court room. * * * * *

Q. (By Mr. Collins): Did Mr. Lower and Capt. Moore comply with your request to meet you at the Hotel Meany?

A. Yes, they did—at 5:30 in the morning.

Q. On what day?

A. I believe it was the 3rd—the morning the boat arrived.

The Court: You mean June 3, 1954?

Witness: Yes.

Q. (By Mr. Collins): What conversation did you have with Mr. Lower [368] at that time?

A. When he arrived at the room, we shook hands, and I asked Mr. Lower—I said: "I am endeavoring to lease a boat to haul freight with. Do you want to go tuna fishing or do you want to go up North?" He said he would like to go North with Capt. Moore.

Q. How long did that meeting last?

A. Oh, I would say a half hour.

Q. When did you see Mr. Lower again?

A. I seen him over at the Wharf Restaurant that evening at Fisherman's Wharf.

Q. Who was present at the time?

(Testimony of Robert J. Tobin.)

A. Capt. Moore, Mr. Gehrig, Doss Payne, Harry Lower.

Q. Confining yourself to Mr. Lower, what conversation did you have with him at that time at Fisherman's Wharf?

A. Told Mr. Lower I was going home; my daughter was sick. I asked him if he wanted to ride as far as Ellensburg. He said: "No. My wife is coming here."

Q. What happened throughout the remainder of June 3rd as far as you are concerned?

A. I spent the entire day endeavoring to see that the boat got to drydock so we could get the screws repaired immediately, take supplies and provisions aboard, and go South. [369]

Q. When did you arrive in Seattle from Ketchikan? A. I don't recall the date.

Q. With respect to June 3, what is your best recollection as to the time you may have reached Seattle? A. Possibly a week before.

Q. What did you do while in Seattle?

A. I checked around to see what it was going to cost to be bait-outfitted; I checked around to find out about refrigeration. I was advised my refrigeration should be got in the South because it is done better and also hunting for Mr. Nybach who had formerly contacted me before in regards to taking us South and teaching us how to fish and how to set the boat up in such a way it would be profitable.

Q. You went back to Spokane the evening of the 3rd? A. Yes, sir, I did.

(Testimony of Robert J. Tobin.)

Q. What communications did you have with any of the shareholders while in Spokane?

A. Mr. Peecher called me up and cursed at me and used vile language over the phone, and Mr.——

Q. On what day?

A. I believe it was the next day.

Mr. Armstrong: The next day from what?

A. I believe it was the 4th.

Q. Who else communicated with you?

A. Mr. Gehrig. [370]

Q. Do you remember I am talking about shareholders? A. Oh, none communicated.

Q. What other shareholders, aside from Mr. Peecher, contacted you, if they did, while you were in Spokane? A. None whatsoever.

Q. Did you try to contact them?

A. No. I went to an attorney right then.

Q. When you met with Mr. Lower and Capt. Moore on the 3rd, what instructions did you give Mr. Lower, if any, with respect to the welfare of the shareholders for the next several days? I mean at your meeting in the morning at the Edmond Meany Hotel.

A. I told Capt. Moore to let the other fellows go home for a couple of days. I asked him how long he thought it would take to repair the screws and turn the boat over to Capt. Bunker, and I asked Harry Lower if he would stay and help Don get the boat to drydock, and he said yes.

Q. Who is Don? A. Capt. Moore. I am sorry.

Q. When did you return to Seattle?

(Testimony of Robert J. Tobin.)

A. The next Monday, the 7th, I believe.

Q. What happened on Monday?

A. I went aboard the ship to endeavor to talk with the shareholders. * * * * * [371]

Q. Well, whom did you talk to at that time?

A. I couldn't talk to anybody. They were talking to me.

Q. Of the shareholders on board, who said what to you? [372]

A. It was Peecher and Mrs. Barquist.

Q. Well, what did they say?

A. Well, they called me——

The Court: You do not have to use profane language. Your statement indicating that in your former answers is a sufficient type of answer on that question. I do not wish you to use any profanity even though it may have been used by somebody else, but you can indicate the subject and the manner of speaking, et cetera, in appropriate language.

A. Well, Mr. Payne was also there.

Q. Well, of the shareholders there, what did they tell you?

A. "We want our money back by 8:00 o'clock in the morning or you are going to get 15 years in prison," and Mr. Peecher said: "I have another \$25.00 here that sees you get there."

Q. Did you discuss the terms of the contract?

A. I had no chance. I asked them to go out to my attorney.

Q. How long were you on board?

A. A very short time.

(Testimony of Robert J. Tobin.)

Q. Are there any other events connected with the Silver Spray on that date, Monday, June 7, as far as you are concerned? [373]

A. Yes. Mr. and Mrs. Barquist rode out with Mr. Gehrig and Mr. Smith to my attorney's office then.

Q. Were you there?

A. I was there; Capt. Moore was there. Capt. Moore and Doss Payne stayed outside.

Q. What was said in the lawyer's office?

A. Mr. Barquist says: "I don't want any trouble with any one." He said: "All I want is my \$2500.00 back, and I will go to the contract and give you 90 days before I file suit against you." * * * * *

Q. What were the later events concerning the Silver Spray, that is, after the 7th?

A. After this, I believe Mr. Barquist went home. [374] Mr. Peecher went back to Portland. I had the Silver Spray put in drydock. It was then attached by Mr. and Mrs. Lower. I went on ahead and paid for the repairs of the screws and had it fixed and endeavored to get the boat released time and time again so that I could proceed with the operation.

Q. Detail your efforts in connection with your attempt to release the vessel.

A. I had communications with Mr. Crutcher. I tried to get bond up. They wanted cash bond because they were asking \$5,000.00 wages. It would cost \$7,000.00 total to raise the bond. I could not get that up.

(Testimony of Robert J. Tobin.)

Mr. Crutcher: I would like the witness to refer specifically to events, if possible.

The Court: Try to be as specific as you can so that others may have some idea and be reminded of what occurred.

A. (Continued): I met with Mr. Crutcher in his office.

The Court: On what day approximately?

Witness: It was after that date some time. I do not recall the date.

A. (Continued): We discussed the subject in relation to getting Mr. Lower's \$2500.00 back, and nothing could be worked out. I kept coming back to Seattle. I would go over home and I would come back to Seattle and try to get [375] the boat released, try to get it working, endeavored to get other people interested in it. * * * * * [376]

Q. Continue now with your efforts to release the boat or with facts relating to the boat?

A. Capt. Moore and I had a meeting with Winehart Breweries in Yakima, the representative. Mr. Moore arranged it. We were endeavoring to get a job for the Silver Spray hauling beer to and from Alaska.

Q. Were you offered any specific contracts?

A. Yes. I was offered a specific contract by, I believe, Church. They are a charter agency. They said if I could get the boat released, he would say—— * * * * * [377]

Q. What was the charter offered to you?

A. Gee, I don't recall, sir. * * * * *

(Testimony of Robert J. Tobin.)

Q. How much were you offered for the use of the vessel?

A. I think it was approximately \$100.00 a day.

Q. Over what period of time?

A. Offer probably ran for a couple of months.

Q. What happened to your personal belongings that you left on board in Ketchikan?

A. I took them off in Seattle, just part of them.

* * * * * [378]

Mr. Collins: Respondents offer A-12 and A-13.

The Court: A-12, in my opinion, is not admissible. A-13 may be. Is there any objection?

(No response.) A-13 is admitted. A-12 is not.

(Respondents' Exhibit A-12 rejected.)

(Respondents' Exhibit A-13 received in evidence.) [380]

Cross Examination

Q. (By Mr. Crutcher): Mr. Tobin, did you tell Harry Lower you owned the Silver Spray when you talked with him on April 17, 1954?

A. I told him I was purchasing the Silver Spray.

Q. Answer the question, please.

A. Yes, I did.

Q. Did you own the vessel on that day?

A. Yes, I had possession.

Q. I asked if you owned the vessel on that date?

A. Yes.

Q. I refer to your answer to Interrogatory 1, in which the following interrogatory was addressed to

(Testimony of Robert J. Tobin.)

you to be answered under oath: "On what date did you become the owner of the vessel Silver Spray?" You answered: "On or about April 28, 1954." Is that answer true or false? * * * * * [381]

A. It is true. * * * * *

Q. Then as of April 16, 1954, you were representing that you owned and operated the Silver Spray? A. No.

Q. Well, Mr. Tobin, this exhibit which is before you and bears your signature states: "Silver Spray Owned and Operated by R. J. Tobin."

A. Yes.

Q. Well, then you were representing that you owned the vessel? [382] A. Yes.

Q. But you did not purchase it until April 28?

A. I had a purchase agreement.

Q. I say you did not purchase it until April 28, 1954, did you? A. That could be true, yes.

Q. Either it is true or is not true.

A. It is true.

Q. Did you tell Harry Lower you did not own it but were simply purchasing it?

A. I showed Mr. Lower the purchase agreement.

Q. Did you tell him that you owned it or did you tell him that you were purchasing it?

A. I told Mr. Lower I was purchasing it and we would have the mortgage within a week or so. * * * * * [383]

Q. Can you explain to the Court what this working share is in a vessel? [385]

(Testimony of Robert J. Tobin.)

A. The working share was to be divided out of the profits of the vessel.

Q. Does it give to the party who contracts with you any right or interest in the vessel itself?

A. No.

Q. So these people were simply your employees?

A. No. They were not.

Q. I refer again to the terms of your contract, clause 2. (Reads clause 2 of Respondents' Exhibit A-1.) You were the first party in these contracts, were you not? A. Yes.

Q. So that these people were to work under your orders? A. Yes.

Q. Then in what respect were they not your employees?

A. In the respect that they had the right to share in all the profits of the boat.

Q. As a means of compensation?

A. As a means of compensation. They could receive their money back. They understood that it was money to be used for the venture.

Q. What was the purpose of this money?

A. Was to outfit the Silver Spray.

Q. And also to buy it? A. Yes. [386]

Q. In other words, these people were advancing money to you so that you could buy the boat, is that right? A. That is right.

Q. Did you tell those people that? A. Yes.

Q. I ask you now specifically did you tell Harry Lower that you were taking a part of this money and with it paying the down payment on the boat?

(Testimony of Robert J. Tobin.)

A. I don't recall. * * * * *

Q. Did you tell Mr. Herning that you were going to take part of the working share money and make a down payment on the vessel? A. No.

Q. Did you use the money he advanced for that purpose? A. Yes. * * * * * [387]

Q. Did you tell them that you were not putting any of your own money into the venture?

A. No. I did not.

Q. How much of your own money did you put into the venture? A. I borrowed \$2,000.00.

Q. What time was that?

A. That was some time in March. I believe March some time. I am not sure.

The Court: How much, if any, of that \$2,000.00 did you put into the purchase price you were paying or obligated to pay for the Silver Spray?

A. I put that money into a vessel called the Sockeye.

Q. With respect to the Sockeye, did you receive \$500.00 from Mr. Kadlec? A. Yes, sir.

Q. What did you do with that money?

A. That money is in the Sockeye.

Q. Mr. Doss Payne who was formerly a libellant in [388] this action gave you \$2500.00. What was done with that?

A. It is in the Sockeye.

Q. Did you ever buy the Sockeye?

A. I had a purchase agreement and equity in it.

Q. I asked if you ever bought the Sockeye?

A. No.

(Testimony of Robert J. Tobin.)

Q. Did you ever represent to Mr. Kadlec that you owned the Sockeye? A. No, I did not.

Q. Do you have before you your contract with Mr. Kadlec? A. Yes, I do.

Q. Read the caption of that contract?

A. (Reading): "Working Share and Contract on Boat or Boats Owned and Operated by R. J. Tobin."

Q. This contract has to do with the Sockeye?

A. Yes.

Q. Would you read clause 1 of that contract?

A. (Reads cause one of Respondents' Exhibit A-10.)

Q. And the last line is "fishing boat Sockeye or tuna Boat, owned by the first party"? A. Yes.

* * * * * [389]

Q. Now, you say you had an agreement to purchase the Sockeye. Was that agreement signed by both owners of the Sockeye?

A. I do not know.

Q. Did you know that one of the owners of the Sockeye was in Norway? A. No, I did not.

Q. Did you ever receive a bill of sale for the Sockeye? A. No, I did not.

Q. Where is the Sockeye now?

A. I do not know. * * * * * [390]

Q. Have you transferred your equity or sold whatever interest you may have had in the Sockeye—and I am honest to say I don't understand what interest you do have?

(Testimony of Robert J. Tobin.)

A. Yes. I have a contract and note. When the boat is sold, I am to receive \$2600.00. * * * * *

The Court: We will take a noon recess.

(At 12:05 o'clock p.m., Friday, September 17, 1954, proceedings recessed until 2:00 o'clock p.m., Friday, September 17, 1954.) [391]

Seattle, Wash., Sept. 17, 1954, 2:00 o'clock p.m.

The Court: You may proceed. * * * * *

Q. (By Mr. Crutcher): I am concerned here with Mr. Kadlec. You took \$500.00 of his money on the basis of a contract wherein you stated you were the owner of the Sockeye? [392]

A. Yes.

Q. What right did that payment give him in the Sockeye?

A. As his contract stated, one third of the share of the catch of fish.

Q. He was to fish on the vessel, is that correct?

A. Yes.

Q. Now, what happens when the vessel does not work, in other words, when there is no use of the vessel? Is Mr. Kadlec unemployed?

A. Every one is unemployed, yes.

Q. When Mr. Kadlec went on board the Silver Spray, did you give him any duties to perform there? A. No specific duties.

Q. Well, Mr. Kadlec has testified that he stood watch as helmsman and as assistant engineer, is that correct? A. Yes.

(Testimony of Robert J. Tobin.)

Q. During such time was he under the discipline of the captain? A. Yes.

Q. What sort of compensation was Mr. Kadlec entitled to by reason of those services, if any, on the Silver Spray? A. None whatsoever.

Q. In other words, Mr. Kadlec was volunteering [393] his services for the Silver Spray, is that correct? A. Yes, sir.

Q. Did you have a clear understanding with him to that effect? A. Yes, I did. * * * * *

Q. Under the terms of this contract, if these people were not your employees, what were they?

A. Sharers in the venture.

Q. What sort of venture are you referring to?

A. The tuna fishing venture.

Q. Where was this tuna fishing venture to be carried out? A. In Southern waters.

Q. Now, I will revert to my original question. What was the purpose of the money which these people gave to you at the time they signed their contracts with you?

A. To outfit, provision and operate the Silver Spray. * * * * * [395]

Q. Now, Mr. Kadlec gave you \$500.00. You have already testified that the money which you yourself put into the venture went into the purchase of what you yourself described as an equity in the Sockeye. What happened to Mr. Kadlec's money?

A. The money coming back from the sale of the Sockeye which I am to receive and have not

(Testimony of Robert J. Tobin.)

received from Mr. Flagler was to go to Mr. Kadlec and Mr. Payne. [396]

* * * * *

Q. Now, when did you commence doing business on behalf of the Silver Spray after you came back from Spokane to Seattle?

A. If it was a Saturday, it would have been a Monday morning.

Q. Which would be April 26, I believe?

A. Yes.

Q. What did you do while you were here in Seattle that first day which related to the operation of the Silver Spray?

A. I was around town, Seattle, gaining what information I could about getting us outfitted and getting us South as fast as possible. [398]

* * * * *

The Court: How did you get this idea of selling these contracts and getting these \$2500.00 sums?

Witness: The only way I could see at the price and the cost of boats and their high operation,—there are a number of fellows like myself who want to fish but could not afford to go into an expensive high-priced boat and outfit it, where, if a group were in it, it would be possible to do so. [403]

* * * * *

The Court: Were you correspondingly concerned [404] about the outturn of the expense being caused to the persons planning to become fishermen from each of whom you took this contribution of \$2500.00? Did that give you any concern?

(Testimony of Robert J. Tobin.)

Witness: Yes, sir, it did, very much so, and I told the fishermen, the shareholders, that we had three alternatives with the boat. If we had had fishing, the possibilities I could see for it were charter work or freight work for the boat.

The Court: You say you had never handled any boats before?

Witness: No, sir, just a small troller in Alaska. I had no knowledge of this big a boat. [405]

* * * * *

Q. (By Mr. Crutcher): Did you run an advertisement in the April 23rd issue of the Seattle Times? A. Yes, I did.

Mr. Crutcher: If I may take just a single sheet from this newspaper——

(Discussion.)

The Clerk: Libelants' Exhibit No. 3.

(Sheet of Newspaper marked Libelants' Exhibit No. 3 for identification.)

Q. (By Mr. Crutcher): Mr. Tobin, will you kindly refer to Libelants' Exhibit No. 3, to the newspaper advertisement on page 36 which is outlined in red and state to the Court whether that [407] is the advertisement referred to by you in your answer to the last question? A. Yes.

Mr. Crutcher: I offer that in evidence.

Mr. Collins: No objection.

The Court: It is admitted.

(Libelants' Exhibit No. 3 received in evidence.)

* * * * *

(Testimony of Robert J. Tobin.)

Q. (By Mr. Crutcher): There has been testimony that the tuna poles were removed at Ketchikan. Was this done under your orders?

A. Yes.

Q. What was the purpose of removing the poles?

A. To get freight aboard.

Q. At that time was there any engagement to carry freight? A. No. [408]

* * * * *

Q. I ask the witness to refer to Respondents' Exhibit A-2, which is a telegram dated May 28 to the vessel. Do you have that telegram before you, Mr. Tobin? A. Yes.

Q. Will you explain to the Court what circumstances led you to send that telegram?

A. I did not want—I was informed that the work was being done on the boat and the completion. I sanctioned it going to drydock. I did not want them to loiter any longer trying to pay for the expenses of that trip but to get back here and go South. [411]

* * * * *

Q. During that time were you doing anything to prepare for the trip with the Silver Spray to go South? A. Yes, I was.

Q. And what was the nature of your work?

A. My preparations was lining up provisions, finding out about bait tanks. I wanted to consult Mr.——

Q. Not what you wanted to do. What you did do.

(Testimony of Robert J. Tobin.)

A. Establishing what we would need in the South, approximately what it would cost.

Q. With whom did you consult in that regard?

A. Oh, various people around the waterfront.

Q. Well, what particular people?

A. Pacific Fishing & Trading.

Q. Mr. Angus? A. He may be the man.

Q. Any other people?

A. Mr. Flagler, Mr. Gehrig.

Q. Was Mr. Gehrig an experienced fisherman?

A. I do not know that. He was on a brine boat, a navigator for a brine boat that had been down there. Mr. Nybach—I tried to get hold of Mr. Nybach because he explained to me he could go with me down to Portland and Astoria, where brine tanks were very cheap. [412]

* * * * *

Q. Did you tell the fishermen that anything else would be put on board in the way of fishing equipment?

A. Yes. I told the fishermen I would endeavor to put anything on there that would make our operation successful.

Q. Did you make any particular reference to bait tanks or refrigeration when you talked with these men at the time of hiring or at the signing of these contracts?

A. Bait tanks at the time of the hiring? Bait tanks and refrigeration were not even in my knowledge then. [414]

* * * * *

(Testimony of Robert J. Tobin.)

Q. Then when you ran an advertisement in the Seattle papers on May 29 and 30, you did know about the bait tanks and refrigeration?

A. I don't know whether I did or didn't at that time.

Q. Did you run an advertisement in response to which Mr. Bunker came to see you in your hotel room June 2nd? A. Yes.

Q. Was that the advertisement which referred to Mr. Gehrig as your business agent?

A. Yes.

Q. At that time then you did know, did you not, that bait tanks and refrigeration were requisite to large scale tuna fishing? A. Yes.

Q. Did you discuss either bait tanks or refrigeration with Mr. Bunker?

A. Yes, I did. [415]

* * * * *

Q. On the morning of June 3, when you talked with Mr. Lower and Capt. Moore, did you say anything to them about going on South for tuna fishing with the vessel? A. Yes, I did.

Q. What did you say to them?

A. I asked Mr. Lower if he wanted to go South for tuna; that Capt. Moore was coming off; Mr. Bunker was staying on; that Capt. Moore was going North. Mr. Lower then said: "I would prefer to go North with Don Moore."

Q. How were you planning the trip North, on what vessel?

A. That was prospective in regards to Mr. Geh-

(Testimony of Robert J. Tobin.)

rig. He sold me on the idea a very good living could be made from having a boat chartered and running North with hiring out to these places, hauling stuff like, oh, they had construction out here they wanted to—Mr. Payne was also interested in that—and they approached me with it, about taking down these apartment houses you buy, these Government apartment houses, and moving them to the North on the boat, and building them.

Q. Were you planning to use the Silver Spray in that trade? A. No.

Q. Then, on the morning of June 3, you still intended to take the Silver Spray South for tuna fishing? [416] A. Yes, I did.

Q. And you were in urgent hurry to do that?

A. I wanted to do that, yes.

Q. The tuna fishing season was already well advanced, was it not?

A. No, I don't believe so. Mr. Overman told me that there would be no rush to get down before June 21st.

Q. So on the morning of June 3rd you still planned to go tuna fishing? A. Yes, I did.

Q. Where did you go on the night of June 3rd?

A. I went to Spokane.

Q. What was the purpose of that visit?

A. My daughter was ill.

Q. How long did you stay in Spokane?

A. I returned the following Monday.

Q. That was on June 7? A. Yes.

(Testimony of Robert J. Tobin.)

Q. In the meantime, had you made any arrangements for the voyage South?

A. The arrangements I made at that time were for the boat to go to drydock.

Q. With whom did you make those arrangements?

A. Mr. Gehrig, Mr. Moore, and Mr. Lower.

Q. What arrangements were made for provisioning [417] the vessel?

A. I didn't put provisions on at that time because there would be no necessity of putting provisions on until it came out of drydock because everybody would be gone home.

* * * * *

Q. Now, you have testified that on June 4, while you were in Spokane, you went to see an attorney after receiving a telephone call from Mr. Gehrig?

A. Yes.

Q. What was the occasion of calling on the attorney?

A. Mr. Gehrig explained to me that the shareholders wanted to take over the boat and I had better consult an attorney.

Q. Now, what happened between the morning of June 3 and June 4 which caused this remarkable change of plans or events?

A. That I do not know.

Q. Is it your position now that as of June 7 you were still planning to immediately take the vessel South for tuna fishing? A. Yes. [418]

Q. Mr. Barquist has testified that when he asked

(Testimony of Robert J. Tobin.)

you what your plans were or "What do we do now", you said: "Let's go to my attorney and you will get your money." Is that testimony true or false?

A. Part of it is false; part of it is true.

Q. Will you explain?

A. Yes, I will. At that time it was, as I explained in earlier testimony, there was confusion in there, and I was frightened, and I asked them to go to my attorney with me, and that is where we went, Mr. Swontkoski's office.

* * * * *

Q. If you then were planning on immediately leaving for the South to go tuna fishing, why was there all this disturbance on board?

A. That I do not know. [419]

* * * * *

Q. Was there any agreement between yourself and Mr. Lower as to when and under what circumstances the \$2500.00 would be returned to him?

A. According to the contract?

Q. Well, I mean your understanding with him, either by reference to the contract or without it?

A. Yes. My understanding with Mr. Lower was that if he would give me 30 days' notice and an additional 90 days, I would give him this money back.

Q. So 120 days from the day he decided to quit the vessel, the employment of the vessel, he would get his money back, is that correct? A. Yes.

Q. And the use of the money by yourself was

(Testimony of Robert J. Tobin.)

the consideration under which he was entitled to work aboard the vessel, is that correct?

A. Yes. [422]

* * * * *

Q. It is possible, is it, that some one could pay you the \$2500.00 and sit at home and receive his share? A. Oh, absolutely not, no.

Q. In other words, he had to be working for you in order to be entitled to his share of the catch? A. Yes.

* * * * *

Q. Was there some condition under which they would forfeit the \$2500.00?

A. No, sir. Mr. Lower did not comply with the agreement and tied up the boat so it was unable to do anything.

Q. Did he forfeit his right to the return of his \$2500.00?

A. Well, I believe he should; he tied the vessel up. [423]

* * * * *

Mr. Crutcher: I have concluded. Mr. Armstrong has a couple of questions he would like to ask.

Cross Examination

Q. (By Mr. Armstrong): Mr. Tobin, when you discussed with Mr. Peecher in Ketchikan, Alaska, his leaving the vessel, was that discussion relative to Mr. Peecher's permanently leaving the vessel or was it temporarily because of his arthritis?

(Testimony of Robert J. Tobin.)

A. I believe it was permanent leave of the vessel.

Q. Isn't it true that he asked you at that time to be permitted to come down to Seattle because of the weather in Alaska, and that he intended to go further with the vessel if it went to Southern waters?

Witness: Would you repeat that?

(Last question is read by the reporter.)

A. No. I don't know.

Q. How do you account for your letter to him on the 28th if that isn't true then, Mr. Tobin?

The Court: Are you familiar with your letter of the 28th?

Witness: Yes.

A. I felt that it was, oh, indefinite on his part and my part, both; that I didn't fully understand or he did [425] either, which was happening there.

* * * * *

Q. It was your thought when you left Alaska that if you had gone to Southern waters for tuna fishing that Mr. Peecher would have been on board? You fully expected that?

A. Yes. [426]

* * * * *

Q. And on June 3, did you have all of your personal belongings off of this vessel?

A. No, I did not.

Q. What other personal belongings did you leave on the vessel?

A. All my rain gear, blankets, gloves, miscellaneous clothing, overshoes.

(Testimony of Robert J. Tobin.)

Q. Necessary items you left on the vessel?

A. Yes.

Q. But you took off on June 3 what you considered your personal gear except for these few items?

A. Yes. I took my bedroll off.

Q. Did you take these additional clothes that you are speaking of off? A. Yes. [427]

Q. Did you take a radio off?

A. Yes. [428]

* * * * *

The Court: Why did you take that stuff off on that day?

Witness: So Mr. Bunker could move aboard and take over as captain and have the captain's quarters.

The Court: Were you intending thereafter to act as captain or have anything to do as one on board with the management of the vessel, with the navigation and work of the vessel?

Witness: Your Honor, I intended to go on ahead to California before the boat got there.

The Court: You say "so Mr. Bunker could take over"?

Witness: Yes. He was going to take over as captain and take the boat out. * * * * * [429]

Q. (By Mr. Armstrong): Did you advise any member or shareholder—when I refer to crew members, I am speaking primarily now and only of shareholders—did you advise any of those persons that you did not intend to be aboard this vessel

(Testimony of Robert J. Tobin.)

and travel with them to California for tuna fishing?

A. Yes, I discussed that.

Q. Whom did you tell that you did not intend to go? A. Mr. Lower, at an earlier date.

* * * * *

Q. Is Mr. Lower the only person you discussed that with? [430]

A. May have been; may not have been. I do not recall.

Q. May I presume from your answer that this discussion was prior to the time you left for Alaska?

A. Yes.

* * * * *

Q. Did you have any further money when that vessel got back to Seattle, M. Tobin, to outfit it for fishing or to pay for any provisions to go to Southern waters?

A. Yes, I believe, recalling right now, I had around \$2,000.00. [431]

Q. All right. Now you told us that you received \$11,500.00 and it had cost you approximately \$6,500.00?

A. It couldn't have because I didn't have Mr. Bunker's.

Q. Isn't it true that part of Mr. Bunker's money went toward the cost of this venture in Alaska, to pay for some of the expenditures made up in Alaska by the vessel? A. No, sir.

Q. Then you wish to correct your testimony? It did not cost you \$6,500.00 to make this Alaska venture? A. That is right.

(Testimony of Robert J. Tobin.)

Q. How much did it cost you?

A. The lay-up caused by the crew members is what——

The Court: No. Just say what it cost you. Instead of \$6,500.00, if you think now it cost you some other sum, say what it was.

Witness: Approximately \$5,000.00.

Q. (By Mr. Armstrong): Then at the time you arrived in Seattle you had, according to your testimony, \$2,000.00 with which to proceed to California?

A. I do not know—at that time.

Q. Will you please give us your best estimate of how much money you had available?

A. I figured there was easily money to fully fuel, [432] put all supplies and stores aboard the boat.

Q. How much did you figure that would cost you? A. Oh, gee, I have no idea.

Q. Now, you just told us you figured it was fully enough. How much? You must have had some idea. You were here for three days, you said, talking about outfitting. How much was it going to cost you to take that boat tuna fishing?

A. Fueling would have cost around \$250.00 or \$300.00, alone, for fuel. Food would probably run in the neighborhood of \$300.00 or \$400.00.

Q. That would leave you some money left available when you arrived in San Diego, is that correct? A. Yes.

Q. Am I correct in presuming from your testi-

(Testimony of Robert J. Tobin.)

mony that when you arrived in California you intended to place bait tanks and refrigeration on board this vessel? A. If possible, yes.

Q. Did you make that representation to the other crew members who were shareholders and are these libelants?

A. For eventuality, yes. [433]

* * * * *

Q. Was this vessel represented to you by any one as being a tuna clipper prior to the time that you printed up your printed documents which you have in evidence here with these various libelants a sbeing your contract? * * * * *

A. Yes.

Q. By whom? A. Mr. Flagler.

Q. Who was Mr. Flagler?

A. He operates a boat sales office. [441]

* * * * *

Q. When did Mr. Flagler tell you this vessel was a tuna clipper? Did Mr. Flagler tell you at that time? A. Not at that time, no.

Q. At a later time? A. Yes.

Q. Did any further negotiations relating to the purchase of this vessel take place through Mr. Flagler? A. No. [443]

* * * * *

Mr. Armstrong: I have no further questions.

Cross Examination

Q. (By Mr. Allison): Mr. Tobin, did you not use the \$2500.00 which Mr. Herning paid to you

(Testimony of Robert J. Tobin.)

as part of the purchase price of this vessel, the Silver Spray? A. Yes.

Q. You used Mr. Herning's money and Mr. Lower's money, did you not, to pay down on the purchase of the vessel? A. Yes.

Q. Did you tell Mr. Herning you were going to use his \$2500.00 for the purchase of this vessel?

A. No.

Q. Did you have any discussions with Mr. Herning whatsoever about any other operation for the use of the Silver Spray other than tuna fishing?

A. Yes. We talked numerous operations. [446]

* * * * *

Q. Did you have a conversation over the telephone with Mr. Herning on the morning of June 3, 1954? A. Yes, I did.

Q. Have you had any contacts with Mr. Herning other than that telephone conversation since that date? A. No, I haven't.

Q. Mr. Herning has not made any demand upon you for the return of \$2500.00 or any other demand with the exception of this libel which he has filed?

A. That is right.

Q. You have not seen Mr. Herning since you left him in Alaska, is that correct?

A. That is right, yes.

Mr. Allison: That is all. [447]

* * * * *

Redirect Examination

Q. (By Mr. Collins): Were any conversations

(Testimony of Robert J. Tobin.)

had relating to the fact that your contracts called the vessel a clipper?

A. No. We had discussions.

The Court: You can ask him what his state of mind and purpose was regarding it. I think that is material, his state of mind as to deception.

Q. (By Mr. Collins): What was your purpose in designating it as a [449] clipper in the contracts? A. I thought it was a clipper.

Q. Did you have any intent to deceive any one by the use of the word? A. No.

* * * * *

Mr. Collins: I have no further questions. [454]

* * * * *

The Court: You may step down.
(Witness excused.)

JAMES T. GEHRIG

called as a witness by and on behalf of respondents, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Collins): State your full name, please. A. James Taylor Gehrig.

Q. Where do you live?

A. 4122 42nd N.E., Seattle. * * * * *

Q. By the way, you have no interest in this [455] litigation, have you?

A. None whatsoever, no. * * * * *

Q. Were you on board the vessel on the 5th or

(Testimony of James T. Gehrig.)

the 6th or the 7th? A. Yes. [456]

* * * * *

Q. Will you tell the Court about that occurrence and who was present?

A. I went aboard the vessel one afternoon—I think it was the day after the boat returned—and at that point there were a great many people mad at each other, and what I was trying to do was to settle the thing down to the point where the boat could continue to operate and so money could be made out of the operation.

Q. Well, who was mad at who?

The Court: If you know or observed.

A. Mr. Peecher was mad at me.

Q. What did Mr. Peecher have to say about tuna fishing? [457]

A. Mr. Peecher wanted to go tuna fishing.

Mr. Armstrong: I didn't understand that.

(Last question and answer are read by the reporter.)

Q. (By Mr. Collins): Who else was mad at who else? A. Mrs. Lower was mad.

Q. Who was she mad at?

A. Well, I assumed that Mrs. Lower was mad because she wouldn't talk to me, and I assumed she was mad at me.

* * * * *

Q. Well, what was the general situation?

A. The general situation was this: The boat comes back from Alaska. Tobin tells me he wants the boat to go to Southern waters for tuna fishing

(Testimony of James T. Gehrig.)

and tells me that he has advised Capt. Moore to prepare the boat for tuna fishing. I advised Mr. Tobin it would be a speculation to go tuna fishing at that date because I know nothing of tuna fishing myself.

The Court: Is that the reason you told him—why you so advised him as you just stated?

Witness: Yes, because I knew nothing of [458] tuna fishing myself.

A. (Continued) I had previously made a number of contacts whereby cargo could be taken from Seattle to Southern ports in Alaska, and it seemed to me at that time that a bird in the hand was worth two in the bush. In other words, I advised Mr. Tobin to take the cargo contracts that were available at that time rather than go tuna fishing.

Q. Some shareholders I assume then had differences of opinion with you?

A. I didn't discuss that with the shareholders.

Q. Well, coming back to this meeting where some shareholders were disturbed, did Mr. Tobin come aboard?

A. Mr. Tobin came aboard, yes, he did.

Q. Who was on board at the time?

The Court: If you can recall any more than you have already said.

A. I can recall Mr. Payne, Mr. Tobin, Mr. Peecher, myself, Mrs. Barquist and Mr. Barquist.

Q. Do you recall any conversation between Tobin and the Barquists at that time?

A. Mr. Barquist?

(Testimony of James T. Gehrig.)

Q. Yes.

A. No. I don't recall any conversation between the two of them.

Q. What was Mr. Barquist's attitude about the venture? [459]

A. Mr. Barquist was quite bitter toward Mr. Tobin.

Q. What did Mr. Barquist want to do?

A. Mr. Barquist wanted to retire from the venture and get his money back.

Q. And you said a moment ago Mr. Peecher wanted to go fishing?

A. Mr. Peecher indicated that to me, yes.

* * * * *

The Court: What was your connection with the vessel, if any?

Witness: My connection with the vessel was that I provided the insurance for the vessel. It was as an insurance agent. [460]

* * * * *

Q. Who was on board then, beside Peecher, Barquist, Payne and Tobin?

A. Don Moore was there and Mrs. Barquist.

Q. Was Mr. Lower present?

A. No. I think that Capt. Bunker was aboard at that time.

Q. Well, what was Mr. Bunker's attitude?

A. Capt. Bunker was, as far as my understanding was concerned, was to take the boat tuna fishing, and he was down there to assume responsibility for it.

(Testimony of James T. Gehrig.)

Q. And what was Tobin's disposition as to the tuna fishing venture? [461]

A. Mr. Tobin told me the boat was going tuna fishing.

Q. Was there what you might call a violent disagreement between any one and Mr. Tobin?

* * * * *

A. Mr. Peecher had been somewhat disturbed. He was considerably upset at me the day I went aboard. He lost his temper toward me. The same thing happened the night Mr. Tobin came aboard the Silver Spray, but I attributed that to a loss of temper and not being a violent thing.

Q. Well, what was the outcome of this meeting?

A. Well, the outcome of the whole thing was that I took Mr. Barquist, Mrs. Barquist and my partner at the time in my car, and we followed Mr. Tobin, Mr. Payne, and Capt. Moore from the wharf to Mr. Swontkoski's office with one stop on the way out there.

Mr. Collins: That is sufficient.

The Court: Any cross examination? [462]

* * * * *

Cross Examination

Q. (By Mr. Armstrong): Did you believe that if these people who were shareholders had had definite information from Mr. Tobin as to what that vessel was going to do, and especially that it was going to go tuna fishing as soon as it could be repaired, that there would have been any dissension among them? [465]

(Testimony of James T. Gehrig.)

A. The men on the boat, when it came back here, knew that the boat was going tuna fishing.

The Court: Mr. Gehrig, could you gather from all that occurred in your presence what it was that was the principal cause of the disturbance, and what it was that they were displeased with? What kind of a policy, if any, of the boat's management were they displeased with?

Witness: I can't answer that, Your Honor.

The Court: Were you not able to learn on that occasion what it was that was causing trouble?

Witness: I was very close to Mr. Tobin. I was very close to all the individuals on the boat. Mr. Tobin told me that the boat was going tuna fishing. He sent a telegram to the boat in my presence for the attention of Mr. Lower.

The Court: That was at Ketchikan, was it not?

Witness: Yes.

The Court: That is not the time we are talking about. We are talking about the time the boat returned from Alaskan waters on or about the 7th of June when there was some dissension on the boat and when you said a lot of people were mad at each other or at somebody.

Witness: Yes, they were. [466]

The Court: What was it on that occasion, if you knew or were able to tell then, that was the central core of that irritation?

Witness: The central core of the irritation, Your Honor, came from the men not understanding what was going on.

(Testimony of James T. Gehrig.)

The Court: You may inquire.

Mr. Armstrong: I have no further questions.

Cross Examination

Q. (By Mr. Crutcher): On the night of June 7, were you present at that meeting, the Monday following the week in which the vessel arrived back in Seattle?

A. Well, that was the occasion when Mr. Tobin came aboard. Yes, I was there.

Q. Were you instrumental in getting Mr. Tobin to come back from Spokane to Seattle for that meeting?

A. I tried very hard to get Mr. Tobin to come back for the meeting.

Q. By long distance telephone calls?

A. Several.

Q. Now, at that meeting, did you hear Mr. Barquist ask Mr. Tobin what he planned to do?

A. Mr. Crutcher, I don't recall that if he asked [467] him; I don't know.

Q. Did any one ask Mr. Tobin what he planned to do with the vessel?

A. I believe several people did.

Q. And what did Mr. Tobin say?

A. "See my attorney."

Mr. Crutcher: I have no other questions.

Mr. Allison: No questions.

The Court: You may step down.

(Witness excused.)

Mr. Collins: The respondents subpoenaed Capt. Moore.

The Court: If Capt. Moore is present, please come forward.

(No response.)

Mr. Collins: If not, we rest.

The Court: The respondents rest. Any rebuttal?

* * * * * [468]

HARRY C. LOWER

called as a rebuttal witness by and on his own behalf, having been previously sworn, was examined and testified further as follows:

Direct Examination

* * * * *

Q. (By Mr. Crutcher): Do you recall the conversation which you had with Mr. Tobin at his home in Spokane on April 17, 1954?

A. Most of it, yes.

Q. Can you state to the Court whether, at this time, you recall whether Mr. Tobin told you he owned the vessel Silver Spray or not?

A. Yes. He said: "I own that vessel. That is my vessel." He showed me a picture.

Q. Did he say anything about a purchase contract? A. Not that I remember, no. [469]

* * * * *

GEORGE S. HERNING

called as rebuttal witness by and on his own behalf, having been previously sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Allison): Mr. Herning, when you discussed the purchase of this share with Mr. Tobin on April 27, did he state to you that he owned the Silver Spray at that time? A. He did.

Q. He did? A. Yes.

Q. Now, Mr. Herning, did you ever discuss with Mr. Tobin at any time any venture other than tuna fishing? A. No, I did not. [470]

* * * * *

The Court: You may proceed, Mr. Carey, with the case in chief of intervening libelants Putnam and Overman.

Mr. Carey: It is stipulated between the respondent Tobin, as owner, and Putnam and Overman, mortgagees, that the preferred ship mortgage described in the Putnam and Overman intervening libel is a valid, subsisting, preferred mortgage, and that the defaults have occurred as alleged in that intervening libel. Is that correct, Mr. Collins?

Mr. Collins: That is correct.

Mr. Carey: It is stipulated between the intervening libelants Putnam and Overman, as mortgagees, and the various shareholders represented by Mr. Crutcher, Mr. Armstrong, Mr. Allison and Mr. Wells that the preferred ship mortgage described in the Putnam and Overman intervening libel is

a valid, subsisting mortgage subject to the priority of any [471] maritime lien that may be found to have been proven by the evidence that, as a matter of law, are superior to that preferred ship mortgage, is that correct, gentlemen?

Mr. Crutcher: Yes.

Mr. Armstrong: Yes.

Mr. Allison: Yes.

Mr. Wells: Yes.

Mr. Carey: It is further stipulated by all counsel that the matter of attorney's fee to be allowed for the foreclosure of the mortgage shall be left to the discretion of Your Honor, if Your Honor will assume that obligation.

The Court: I will hear some statement about what work was done if counsel cannot agree upon what the fee should be. Also, I wonder if you should not file in the records and introduce in evidence as an exhibit the original note and mortgage.

Mr. Carey: I was just going to do that. The mortgage and note should be taken out of circulation.

The Clerk: Libelants' Exhibit 4.

(Preferred Mortgage marked Libelants' Exhibit 4 for identification.)

Mr. Carey: That is the ship's mortgage. I now [472] offer note dated April 28, 1954, being a note stipulated to be in default.

The Clerk: Libelants' Exhibit 5.

(Note marked Libelants' Exhibit 5 for identification.)

The Court: Do you offer each of these exhibits?

Mr. Carey: Yes, Your Honor.

The Court: Libelants' Exhibit 4, denominated "Preferred Mortgage" is offered. No objection being stated, it is now admitted.

(Libelants' Exhibit 4 received in evidence.)

The Court: Has any one any objection to Libelants' Exhibit 5, which purports to be the original note for the sum of \$30,000.00? There being no objection, that is now received in evidence.

(Libelants' Exhibit 5 received in evidence.)

Mr. Carey: I now offer, with the consent of counsel, a "Certificate of Ownership" of the vessel dated August 23, 1954, certified by the Collector of Customs. [473]

The Clerk: Libelants' Exhibit 6.

(Certificate of ownership of vessel marked Libelants' Exhibit 6 for identification.)

The Court: Is there any objection to its offer? It is admitted.

(Libelants' Exhibit 6 received in evidence.)

Mr. Carey: That is all, Your Honor. We rest.

* * * * * [474]

The Court: This case is continued for further trial proceedings on the merits, including arguments on the merits, to the afternoon of Monday, October 11, at 2:00 o'clock p.m.

(At 4:45 o'clock p.m., Friday, September 17, 1954, proceedings recessed until 2:00 o'clock p.m., Monday, October 11, 1954.) [475]

Seattle, Wash., October 18, 1954, 10:00 o'clock a.m.

The Court: May I ask counsel in the Silver

Spray case, the Court being again in session, if you are ready to proceed with the argument of that case on the merits?

All Counsel: Yes.

(Discussion concerning the allotting of time for argument.)

(Arguments made by proctors on behalf of libelant, additional libelants, additional intervening libelants, and respondents.)

The Court: As to the intervening libelant Kadlec, notwithstanding the form of his libel and the statements therein contained, he proved a contract for a specific wage, and he worked and earned a specific wage upon the agreed compensation of \$100.00 per week. While it might be argued that [476] there was some five and one-half weeks time involved, I think the more certain proof as to time would be five weeks, and so from a preponderance of the evidence the Court finds, concludes and decides as to that intervening libelant that he entered upon agreement with the respondent Tobin that he, Mr. Kadlec, should be employed and he was employed on a vessel of the respondent Tobin, to wit, the Silver Spray, at the agreed specific wage of \$100.00 per week, and that he worked for five weeks, entitling him to a decree in this case that he has a maritime lien for seamen's wages for that length of time; that the lien is against the vessel the Silver Spray; that he is entitled to have the vessel condemned and sold and to receive from the proceeds thereof his costs in this action to be taxed and to further have out of such proceeds his wages

so adjudged to be due him for said five week period at \$100.00 per week.

Further, the Court so finds, concludes and decides that the intervening libelant Kadlec never effectually entered into any agreement to work for the respondent Tobin on the Silver Spray or elsewhere upon any fisherman's lay contract.

In respect to the libelant and the other [477] intervening libelants in this action, the Court from a preponderance of the evidence does find, conclude and decide as follows:

That of such causes of action as the libelant and intervening libelants had on June 7, 1954, one such cause of action was for the recovery of damages to the extent of the value on that date of libelant's and intervening libelants' share in the prospective fishing catch of the Silver Spray equipped as a fresh bait tuna fishing boat and tuna clipper for the fishing season of 1954, and on that cause of action the libelant and intervening libelants sued in their libels.

It is possible that such libelant and intervening libelants also had on that day a cause of action at common law against respondent Tobin for fraud and deceit or some other action at law, but on that date such libelant and intervening libelants were not required against their choice to sue upon such causes of action at law, and they did not do so.

The mere fact that on cross examination one or more of them may have given testimony tending to evidence a cause of action at law does not in this case prevent the libelant and intervening [478]

libelants from disavowing any request or intention of request for any relief in this admiralty court on any such cause of action at law, and each and all of such libelant and intervening libelants have effectually disavowed any such intent through their counsel who have a right to speak for them.

From a preponderance of the evidence in this case, the Court finds, concludes and decides further that, upon the authority of *Carbone vs. Ursich*, 209 F2d 178, among other authorities, libelant and intervening libelants on June 7, 1954 had a valid cause of action in rem against the vessel *Silver Spray*, her engines, tackle, apparel, furniture and equipment, and also in personam against Robert J. Tobin for damages to the extent of the then value of the share of each of said libelant and intervening libelants in and to the prospective tuna fish catch of the *Silver Spray* as a tuna clipper, as a fresh bait tuna fisher, for the season 1954; that such right was secured by a maritime lien at that time, namely, June 7, 1954, against the vessel *Silver Spray*, her engines, tackle, apparel, furniture and equipment; and that the nature and rank of such lien was one for seamen's wages and has a rank superior to the maritime lien of the [479] preferred ship mortgage which is involved in the intervening libel of intervening libelants Putnam and Overman; that the value of such share in such prospective season's fish catch is the sum of \$7500.00, for which amount each libelant and intervening libelant has a maritime lien against said *Silver Spray*, her engines, tackle, apparel, furniture and equipment, and

also has a right in personam against Robert J. Tobin, the respondent;

That the respondent Robert J. Tobin abandoned the contract of employment of libelant and intervening libelants and also the fishing voyage on said 7th day of June, 1954; that at all times prior thereto and subsequent to the date of the lay fishing agreement of each of such libelant and intervening libelants respectively, they and each of them were ready, able, and willing to perform said lay fishing contract on their and each of their parts to be performed; and that the abandonment of the said fishing voyage and of said lay fishing contract by the respondent Robert J. Tobin, the owner and operator of said Silver Spray, was through no fault of either of such libelant and/or intervening libelants.

That in respect to said sum of \$7500.00 [480] adjudged to be due and owing to each of said libelants and intervening libelants and for which each of them has a valid and subsisting maritime lien against the said vessel, her engines, tackle, apparel, furniture and equipment, they are entitled to have such vessel and her engines, tackle, apparel, furniture and equipment condemned and sold and the proceeds thereof applied, first, to the maritime liens of each of such libelant and intervening libelants in this action and to the payment of costs and disbursements properly taxable as costs in this action.

That the said maritime lien of each of such libelant and intervening libelants is superior to the maritime lien of the preferred mortgage of inter-

vening libelants Putnam and Overman in this action

That the intervening libelants Fred I. Putnam and James A. Overman, as mortgagees under the preferred mortgage in this case, have a preferred mortgage lien and a maritime lien against said vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, and in personam against Robert J. Tobin for the sum unpaid, as to which I ask counsel to state the exact amount [481] computed as of the date when judgment and decree are to be entered, to secure the obligation of said Robert J. Tobin and said vessel and her engines, tackle, apparel, furniture and equipment, to pay the sum and the installments thereof unpaid under a certain promissory note which is of record in this case; and that such maritime lien is validly against said vessel and her engines, tackle, apparel, furniture and equipment superior in rank to all maritime or other liens of every name and nature against said vessel and her said engines, tackle, apparel, furniture and equipment, excepting only the maritime liens herein foreclosed of the above-mentioned John Kadlec and each and all of the other libelant and intervening libelants in this case; and that as to said maritime lien of said intervening libelants Putnam and Overman against said vessel, her engines, tackle, apparel, furniture and equipment, they are entitled to have such vessel, her engines, tackle, apparel, furniture and equipment condemned and sold and the proceeds of her sale applied to pay the amount of such claim and

claims of said intervening libelants Putnam and Overman under and by virtue of [482] said promissory note and preferred ship mortgage, subject, however, to prior full and complete payment of the claims in the amounts herein found due of the libelant and said intervening libelants and said Kadlec, and provided that if, after the payment of such claims and the taxable costs of such libelant and intervening libelants and said Kadlec in full, there are any remaining proceeds of sale, then the remainder of any proceeds of such sale of said vessel, her engines, tackle, apparel, furniture and equipment, shall be applied next to the payment of the claims and costs herein awarded in favor of said intervening libelants Putnam and Overman.

It is further so found, concluded and decided that for any unpaid sum in this decision found due and owing to said Kadlec and such libelant and other intervening libelants, and also to said intervening libelants Putnam and Overman, or any of them, after applying such sale proceeds to payment of such claims in accordance with the order of their superiority in rank as heretofore announced in this decision, then any deficiency so remaining unpaid shall be paid by said respondent Robert J. Tobin to such of said claimants as [483] so remain unpaid.

Is there any issue tendered in this case not decided by the Court's orally announced decision?

Mr. Carey: Yes.

Mr. Crutcher: Yes, Your Honor. There is a counter-claim asserted as a so-called third affirma-

tive defense of wrongful attachment of the vessel.

The Court: The Court finds, concludes and decides that there was no wrongful attachment of the vessel by the libelant or any one of the intervening libelants; that the right of action of such libelant and intervening libelants had already arisen and the right to sue had already arisen at least three days before the libels of such libelant and intervening libelants were filed. [484]

And now your question, Mr. Carey.

Mr. Carey: Your Honor overlooked a very important matter.

The Court: I am very anxious not to end this hearing without disposing of everything.

Mr. Carey: The matter of allowing attorney's fees for the foreclosure of the preferred ship mortgage.

The Court: Does any one else think of any other issue overlooked?

Mr. Collins: I might suggest that the findings should probably deny our claim of \$100.00 loss of use per day since the seizure.

The Court: The Court believes that that should be done, and the Court finds, concludes and decides that the claim of the respondent Tobin in the nature of demurrage or detention of the vessel to the extent of \$100.00 a day——

Mr. Collins: That was the claim. Of course, I am not agreeing to it. I am just suggesting it. In keeping with Your Honor's theory, it should be put in, I think.

The Court: (Continued) —— is not valid and

should not be allowed, and that said respondent Tobin take nothing by his affirmative defenses and [485] counterclaims asserted by him in this action.

The Court further finds, concludes and decides that the sum of \$ (Later set at \$2500.00) is a reasonable sum to be allowed to Mr. Stephen V. Carey as proctor for said Fred I. Putnam and James A. Overman, the mortgagees and additional intervening libelants in this action for his services in connection with the foreclosure of said mortgage.

Will you, Mr. Carey, advise the Court for the Court's convenience at this time what did you ascertain to be the final amount by the computations you have made up to this time due to your clients under that note and mortgage?

Mr. Carey: Well, I haven't made the computation, Your Honor.

The Court: Do you know what it is approximately?

Mr. Carey: Just a moment, Your Honor.

(Mr. Carey confers with Messrs. Putnam and Overman.)

Mr. Carey: The face of the note is \$30,000.00, and there is approximately \$750.00 interest accumulated.

The Court: And there has been nothing paid on principal? [486]

Mr. Carey: No.

The Court: Have counsel talked together and given each other the benefit of their suggestions about what would be a reasonable sum for attorney's fees in this case?

Mr. Carey: No. I haven't discussed it with anybody.

Mr. Crutcher: I would suggest that that could be appropriately done between now and the time we appear for the signing.

Mr. Carey: We agreed to leave it with Your Honor, and I am perfectly willing to leave it there. If counsel wants to make some suggestions, I have no objection to the making of suggestions, but I am not going to bargain with the opposition.

The Court: The only way I would welcome suggestions from one would be to have suggestions from both sides.

Mr. Carey: Well, I have no objections to the making of suggestions.

(At this time discussion was had relative to the legal services performed by Mr. Carey on behalf of the intervening libelants Putnam and Overman.) [487]

Mr. Carey: My own judgment is that \$2500.00 would be a proper fee for such services.

The Court: Any objection to that?

Mr. Crutcher: I think that is just about right.

The Court: That is what I think.

The reporter in the notes already made by the Court where the place is left blank as to the amount of the attorney's fee will fill in there the sum of \$2500.00.

Now, were there any other issues which counsel for libelant and intervening libelants wish to mention as not having been disposed of by the Court's orally announced decision up to this time?

Mr. Crutcher: One matter, may it please the Court, is evidence in the case which tends to show that as to each of the six crew member libelants, except Kadlec to whom it does not apply and Peecher,—there is evidence of earnings——

The Court: The Court, of course, requires that credit be given on these claims adjudged due and owing for the amounts already received on account of their lay fishing contract by the libelant and intervening libelants,—— [488]

Mr. Crutcher: I assumed Your Honor did, but——

The Court: (Continued) ——and the correct amounts of the lien claims are to be finally determined by ascertaining the remainder after such deduction or credit.

Mr. Crutcher: I have those figures in our brief.

The Court: Well, I wish you to have them put in the proposed findings of fact, conclusions of law and judgment and decree, which are to be proposed in this case.

Is there any other detail not covered?

Now, if that is all, I wish to indulge your time just for a moment to state one or more reasons why the Court has adjudged valid and superior in rank these fishermen's claims as maritime claims against the vessel, etc.

It is true that in a case of a labor contract where the issues between the lay fishermen on the one hand and the ship on which they were employed and the owner of that ship on the other hand, on this question of whether or not the share of the

prospective catch not yet realized the fishermen have a maritime lien for damages for [489] unpaid wages or have a seamen's work contract maritime lien of that kind, it seems to the Court from the best I can learn from the briefs and also from the Court's own search that there is not a Ninth Circuit or Supreme Court case already decided absolutely in point.

I feel certain, however, that the right of fishermen seamen for unpaid expected work liens against their fishing vessel under an express work contract is no less than that against another vessel not a party to the labor contract for a maritime tort lien such as that involved in the Carbone case reported in 209 F. 2d 178, and the conclusion that there is a valid maritime lien for such unpaid expected work of the rank attributed to it in this Court's decision now made in this case is one which comes a fortiori from the Carbone case approval of a maritime tort lien claim against a stranger vessel respecting in part the same kind of a claim as that involved in this case, namely, a claim for the present value of each share of the fishermen seamen in the prospective season's fish catch.

The circumstance in the Carbone case that only five days prospective catch may have been [490] involved is no different in principle than if a five months prospective catch or the whole 1954 tuna season's catch had been involved.

However, Judge John Parker's dissent in the Fourth Circuit case of Old Point Fish Co. vs. Hay-

wood, 109 F. 2d 703, is a strong supporting pillar which cannot properly be overlooked when considering what the opinion of the Ninth Circuit Court of Appeals is or may be on this question, although the majority ruling in the Haywood case is against this Court's decision.

The Ninth Circuit Court of Appeals has said in the Carbone maritime tort lien case that there is a lien for that kind of an interest which is here involved, and this Court cannot believe that the Ninth Circuit Court of Appeals will refuse to apply the rule announced in the Carbone case to the facts and cause of action in the case at bar involving breach of seamen's work contracts for lay shares of the prospective 1954 tuna fishing season's catch of the vessel which is held by this Court to be subject to a maritime lien for the cause of action stated.

When will counsel wish to present findings of fact, conclusions of law, judgment and decree [491] in this matter?

The vessel is still in the Marshal's custody as I understand it and I imagine is accumulating day to day costs.

Mr. Crutcher: We would like to be in a position to present that some time late this week, Your Honor, if we can, possibly Thursday.

(Discussion was had relative to the setting of a date for the entering of findings of fact, conclusions of law, judgment and decree.)

Mr. Crutcher: Would this be agreeable to Your Honor, if our findings and conclusions and proposed form of decree are prepared and served by

Monday and lodged with the Court on Monday, might we have the matter noted for Wednesday, the 28th of October?

The Court: I prefer it on the 28th. Any objection?

Mr. Collins: No objection.

Mr. Wells: I will respectfully say that I will be involved in a mal-practice action in Superior Court on the 26th. However, long before the matter has come into Court I will have looked at the findings prepared and will authorize Mr. Crutcher to speak for me. [492]

The Court: Is that agreeable?

Mr. Crutcher: Quite agreeable.

The Court: I wish to invite all counsel to be present if that is possible and I assure you that your presence will be helpful to the Court, but if any one of counsel on the side of the fishermen presents approved forms of the papers to be entered by the Court and is then authorized to speak for all, the Court will not feel that it is out of order for you to be absent. I take it from the fact that Mr. Crutcher has borne the laboring oar more or less that he will try to be here.

Mr. Crutcher: I will, Your Honor.

The Court: Then on the other side, I hope that both counsel can be present. Do you anticipate any conflicting appointments on that day?

Mr. Collins: I do not, Your Honor.

Mr. Carey: I don't.

The Court: It is then set for ten o'clock in the

forenoon on October 28th. Until then, those connected with this case are excused.

I ask you to provide for condemnation and sale of the vessel and the paying out of the proceeds on those libels and intervening libels to [493] lien claimants in harmony with the foregoing, that is, I wish the provisions as to validity and rank of liens and as to condemnation and sale of the vessel and distribution of proceeds of sale upon the libel of the intervening libelants Putnam and Overman to be repeated to the same effect as stated in respect to the fishermen libelant and intervening libelants.

Mr. Carey: Very well, Your Honor.

(At 2:40 p.m., Monday, October 18, 1954, trial proceedings concluded.) [494]

[Endorsed]: Filed December 21, 1954.

[Endorsed]: No. 14645. United States Court of Appeals for the Ninth Circuit. Fred I. Putnam and James A. Overman, Appellants, vs. Harry C. Lower, John Kadlec, George S. Herning, Edgar L. Peecher, William E. Barquist and Norman L. Bunker, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: February 7, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 14645. United States Court of Appeals for the Ninth Circuit. Fred I. Putnam and James A. Overman, Appellant, vs. Harry C. Lower, et al., Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: April 12, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14645

FRED I. PUTNAM and JAMES A. OVERMAN,
Appellants,
vs.

HARRY C. LOWER, et al., Appellees.
The Oil Screw SILVER SPRAY, etc., et al.,
Respondents.

STIPULATION ON EVIDENCE, ISSUES AND
PLEADINGS ON APPEAL

It Is Stipulated between the undersigned proctors for the respective parties to this appeal as follows:

* * * * *

4. That the proof of mitigation of damages by

the respective libelant crew members sustains the finding of fact thereon, being Finding XXII, and that the testimony pertaining thereto is not relevant to the appeal.

* * * * *

Dated this 4th day of February, 1955.

PEYSER, CARTANO, BOTZER &
CHAPMAN,

/s/ By VERNON H. BOTZER,
Proctors for Appellants

* * * * *

[Endorsed]: Filed Feb. 7, 1955. Paul P. O'Brien,
Clerk.



No. 14645

United States Court of Appeals
For the Ninth Circuit

FRED I. PUTMAN and JAMES A. OVERMAN, *Appellants*,
vs.

HARRY C. LOWER, JOHN KADLEC, GEORGE S. HERNING,
EDGAR L. PEECHER, WILLIAM E. BARQUIST and
NORMAN L. BUNKER, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANTS

WILLIAM H. BOTZER
PEYSER, CARTANO, BOTZER & CHAPMAN
Proctors for Appellants.

1415 Joseph Vance Building,
Seattle 1, Washington.

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United States Court of Appeals

For the Ninth Circuit

FRED I. PUTNAM and JAMES A. OVERMAN,
Appellants,

vs.

HARRY C. LOWER, JOHN KADLEC, GEORGE
S. HERNING, EDGAR L. PEECHER, WIL-
LIAM E. BARQUIST and NORMAN L.
BUNKER,
Appellees.

No. 14645

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANTS

STATEMENT OF JURISDICTION

The appellants were the owners of the oil screw Silver Spray and sold the vessel to Robert J. Tobin for the sum of \$35,000.00 on a down payment of \$5,000.00, taking a first preferred marine mortgage to secure the balance (Libs. Putnam and Overman, Exs. 4 and 5). Under written agreements Tobin sold fishing shares to appellees Harry C. Lower, George S. Herning, Edgar L. Peecher, William E. Barquist and Norman L. Bunker. Before the Silver Spray commenced the fishing voyage it was attached by the United States Marshal on a libel in rem filed by Lower (Tr. 3). The libel purports to be "in a cause of wages and damages, civil and maritime" and seeks a recovery of \$5,000.00

against the vessel in rem as the sum Lower might have earned had the fishing venture been fulfilled. The appellees Herning, Peecher, Barquist and Bunker filed intervening libels of the same substance (Tr. 12, 20, 27) and for like recoveries but did not apply for formal seizure through monition and attachment.

Thereafter the appellants intervened by their libel in rem and in personam (Tr. 33) to foreclose their first preferred marine mortgage and proceeded with the formalities of an original monition and attachment (Tr. 41).

The District Court issue was whether the appellees had liens for future fishing shares, or any liens at all, superior to appellants' preferred mortgage.

The said appellees did not cite Tobin for in personam recoveries but only for deficiencies after sale.

The appellants contend that the pleadings of the said appellees, together with uncontradicted evidence and testimony, clearly demonstrate that in fact said appellees brought the proceedings as a means to recover their original investments on the grounds that Tobin extracted monies through fraud and deceit. Accordingly, the actions were not of admiralty cognizance and should have been brought as common law proceedings. Therefore the appellants take the position that the District Court did not have jurisdictional authority to enter Findings of Fact and Conclusions of Law (Tr. 63) and the Decree (Tr. 77) granting said appellees maritime liens for speculative earnings on fish that were never caught, all to the prejudice of appellants' mortgage.

Jurisdiction is only one issue on appeal. As developed in our Statement of the Case and our Argument we challenge the merits on two points, namely: said appellees were not entitled to maritime liens for speculative fishing shares where the vessel never left the dock and consequently fish were never caught; and, there was an utter failure to prove speculative damages.

Jurisdiction of the District Court

It is contended the District Court did not have admiralty jurisdiction to entertain appellee Lower's libel in rem or the libels of Herning, Peecher, Barquist and Bunker as in fact and law they were common law actions to recover money had and received through deceit, and as such jurisdiction was solely vested in the common law side of the appropriate court. Under the provisions of Title 28, U.S.C.A., Sec. 1333, the District Court did have jurisdiction to foreclose appellants' first preferred marine mortgage as alleged in their Intervening Libel in Rem and in Personam (Tr. 33).

Jurisdiction of the Court of Appeals

The jurisdiction of this court is granted by the provisions of Title 28, U.S.C.A., Sec. 1291, which gives to the Courts of Appeal, jurisdiction of all appeals from final decrees of District Courts.

STATEMENT OF THE CASE

Throughout the trial the said appellees stressed their claims that Tobin intended to defraud them in the original negotiation of the written fishing share agreements beginning with the Lower contract of April 17, 1954, through to the Bunker contract of June 2, 1954 (Res. Exs. A-1, and A-5 to A-8 incl.). They further

contend that Tobin abandoned the Silver Spray on June 7, 1954. The District Court found (Findings of Fact XV, Tr. 67; Oral Decision, Tr. 281) that Tobin did so abandon the venture giving rise to liens for future fishing shares.

The appellants will make some reference to the facts to support their basic argument that the said appellees actually claimed fraud and deceit as a basis for the recovery of their investments and therefore the District Court sitting in Admiralty lacked jurisdiction. Insofar as the priority of the mortgage is affected, the appellants are not concerned with Tobin's intentions at the times the contracts were executed, or why or under what circumstances the said appellees left the vessel. The applicable law will demonstrate that in rem liens cannot exist for future speculative fishing shares where the voyage was never undertaken, and particularly where the libelants themselves caused the vessel's seizure. For what the observation may be worth, appellants do feel that the finding of wrongful discharge by Tobin cannot be justified by the record. Had there been a wrongful discharge, said appellees might have had personal recourse against Tobin but not against the Silver Spray to the prejudice of the mortgage. Appellants do believe that the record lends credence to said appellees' position that in the original negotiation of each share contract, Tobin exaggerated the earning potential of the Silver Spray. In properly instituted actions at common law, juries would be required to determine whether said appellees were thoroughly informed and accepted the consequences, or whether they were induced through fraud to part with their funds.

At this time it may be appropriate to explain the position of appellee Kadlec. On April 14, 1954, he signed a working share contract with Tobin on the Sockeye (Res. Ex. A-10) but by an intervening libel (Tr. 12) claimed he was a member of the crew of the Silver Spray. He maintained in his libel, as did the others, that Tobin discharged him and accordingly he was entitled to recover against the Silver Spray the sum of \$5,000.00 as his share of the 1954 tuna catch, if the vessel had gone fishing. Later Kadlec, through his proctor Robert Wells, withdrew from the case (Tr. 31) and refused to plead further. At the trial, however, he appeared through Bogle, Bogle & Gates, and for the first time orally claimed a lien of \$500.00 for wages due while working on the Silver Spray. Thus throughout this brief Kadlec will be referred to individually as distinguished from the remaining appellees who signed Silver Spray fishing contracts and who will be collectively referred to as "libelants" or "appellees."

The validity of appellants' preferred mortgage has no relationship to the representations or the misrepresentations made by Tobin at the varying times the contracts were entered into. However, it would seem that the trial court was persuaded to hear the case in admiralty in order to test the legitimacy of Tobin's defalcations as alleged and testified to by the appellees. Principally the appellees complain:

1. They were induced to buy shares to tuna fish off San Diego, California, and make anywhere from \$5,000.00 to \$7,000.00 a year.
2. In San Diego the vessel would be outfitted with bait tanks and refrigeration.

3. Tobin claimed the vessel was a tuna clipper when it was not.
4. Tobin claimed he had a contract with Van Camp's in California.
5. Tobin said they would hire a helicopter to find tuna.
6. Tobin told Lower and Herning that he owned the boat but did not at that time.

These, among other statements, were strongly emphasized by appellees at the trial as being misrepresentations. Tobin answered that he knew nothing about tuna fishing and said so but hoped the fishing party would accomplish its purpose; had a purchase agreement for the boat from appellants which was not consummated until April 28, 1954, the date of the note and mortgage; was told by a third party that the Silver Spray was a tuna clipper and that tuna clippers made that kind of money; and, further, that the shareholders were fully informed of these factors and understood the risks involved.

To reveal the background leading to these proceedings, and to enlighten the court as to the general nature of the controversy between appellees and Tobin, and to support our jurisdictional argument, we proceed with the highlights of one of the strangest of all maritime adventures.

Pursuant to newspaper ads (Lib. Ex. 3) the appellees communicated with Tobin and after preliminary discussions signed the share contracts as noted. All paid \$2,500.00 except Bunker, who paid \$1,500.00 and gave a promissory note for \$1,000.00 for the balance. Each of the contracts in part provides that if the shareholder becomes dissatisfied he shall give Tobin thirty days

notice to enable Tobin to replace the share without hindering operations, and if the shareholder leaves or is dismissed he shall give Tobin ninety days to make a full refund. Each contract also provided that Tobin had the right to direct the vessel's movements.

On May 18, 1954, the Silver Spray left for Alaska on a shake down cruise and on board were the appellees, Tobin, Kadlec, Doss R. Payne, one James T. Gehrig and three hired members who were the cook, the engineer and the captain Don Moore. Payne was an intervening libelant along with Kadlec and Bunker (Tr. 12) but Payne refused to press the litigation or appear at the trial. One other man named Trowbridge went along for the excursion but his identity plays no part in the litigation. After the Silver Spray reached Alaska, and within several days of May 21, 1954, Tobin returned to Seattle by air to investigate a fruitless Silver Spray enterprise that should have developed during the Alaska trip (Tr. 236, 237). Gehrig and Peecher returned with him, the later claiming he could not stay aboard due to his health. Peecher wanted a quiet settlement and Tobin agreed to refund Peecher's money as fast as possible (Tr. 173, 238).

Appellants leave this meager review of the transcript momentarily to remind the court that as evidenced by the testimony, the appellees' case was founded upon the proposition that the happenings during the Alaskan voyage were part and parcel of Tobin's design to exact funds through false representations.

Reverting to the record we find that when Peecher arrived in Seattle he continued on to his home in Port-

land, Oregon. On May 28, 1954, Tobin wrote Peecher that he was leaving for the south very soon and wanted to know if Peecher was willing to go along or have his money back. Peecher replied on May 29 that he would be under a doctor's care and would like his money as soon as Tobin could pay (Res. Ex. A-9). While in Seattle Tobin claims he checked with various sources as to the means of obtaining equipment to tuna fish (Tr. 240). This episode, as are all others, is doubted by appellees. On May 28, Tobin wired Moore and Lower in Alaska as follows:

“Get ready to leave immediately for Seattle. Bring poles so can outfit for southern tuna. Call me Edmond Meany Hotel, Seattle, immediately.”
(Res. Ex. A-2)

On June 2, Tobin and Bunker signed the working share agreement to leave for tuna fishing shortly (Tr. 205-206). By ship-to-shore Tobin learned that the vessel hit a log in Puget Sound and needed repairs. Moore and Lower met Tobin at the hotel at 5:30 A.M., June 3, and Tobin instructed Moore to let the men off to go home during drydocking. Tobin made drydocking arrangements and in the evening told Lower he was going to Spokane because his daughter was sick. Tobin did so and remained there until June 7. According to Tobin he removed his gear from the vessel so that Bunker could have the captain's quarters, but in any event Tobin expected to precede the vessel to the south (Tr. 262). On June 4, Lower removed all his gear (Tr. 108), never returned to the Silver Spray, and on June 5 sought legal guidance through the Seattle law firm of Bogle, Bogle and Gates.

There has been no satisfactory explanation for the occurrences between Tobin's departure on the evening of June 3 until his return to Seattle on June 7. Peecher announced his decision to withdraw by his letter of May 29. Lower left on June 4. Gehrig, who was on board June 4, testified that a number of people were mad at each other. Barquist then wanted to retire and recoup his investment (Tr. 270). Gehrig testified Tobin wanted to go tuna fishing, though Gehrig wanted to freight in Alaska (Tr. 269). On the 4th Gehrig wanted to remove Tobin from the vessel and form a corporation (Tr. 171). The libels allege Tobin abandoned the vessel and appellees did not know his whereabouts, though several tried to reach him at his own Spokane address. Gehrig contacted him and said there was trouble, whereupon Tobin sought a Spokane lawyer. On June 7 Tobin returned to the vessel and found Peecher so pugnacious that he threatened to jail Tobin unless he got his money back (Tr. 242) and wanted to punch him in the nose (Tr. 177). Tobin said settle with my lawyer and arranged to see Mr. Swontoski that evening. While at the lawyer's Barquist wanted nothing more than his money back, and was willing to abide by the contract and give Tobin the agreed ninety days (Tr. 270). Throughout this upheaval Bunker assumed he would take the boat tuna fishing (Tr. 270).

As far as Herning is concerned, he went home for liberty on the 3rd when the vessel docked (Tr. 148). Tobin called him on the 3rd and asked if he could handle the engine room (Tr. 149). Herning knew the vessel had to be drydocked and an operational delay was unavoidable (Tr. 155).

After the fiasco of the 7th, Tobin proceeded to put the vessel in drydock (Tr. 243) but during the course of repairs it was seized through the Lower libel on June 10; nevertheless Tobin paid the drydocking bill of \$356.00 (Tr. 235; Res. Ex. A-2, pocket S). Thereafter he claims he attempted to post bond, release the vessel and proceed with the operations (Tr. 243, 244).

All appellees admit that Tobin never fired them: Herning (Tr. 156); Lower (Tr. 119); Barquist (Tr. 202); Peecher (Tr. 174).

That the appellees were, or were not, in admiralty solely depends upon their interpretation of the facts under oath and the nature of the relief they were seeking. Accordingly we respectfully defer a review of their testimony on this phase until we reach our argument on the lack of admiralty jurisdiction in the District Court.

To prove damages measured by the loss of speculative fishing shares, the appellees produced Hervey Petrich. Obviously he was an unbiased witness and experienced in the tuna clipper industry. In general he frankly admitted he knew nothing about the potential earnings of a jig boat like the Silver Spray. As the proof of damages is in issue on the merits, we ask leave to detail his testimony throughout the course of our argument on that subject.

Also, at the pleasure of this court, later we prefer to examine the evidence as to Kadlec's alleged wage agreement with Tobin on the Silver Spray.

SPECIFICATION OF ERRORS RELIED UPON

1. The court erred in failing to find and decree that the preferred marine mortgage of appellants Putnam and Overman is a first, prior, and superior lien against the vessel Silver Spray, or its proceeds.

2. The court erred in finding and decreeing that libelant Lower and intervening libelants Herning, Peecher, Barquist and Bunker, or either of them, have any lien whatsoever against the vessel, or any cause of action either in personam or rem enforceable in admiralty.

3. The court erred in finding and decreeing that said libelant and said intervening libelants proved any damages, and this error is assigned regardless of whether the libels were or were not properly instituted and prosecuted within the admiralty jurisdiction of the District Court.

4. The court erred in finding that said libelant and said intervening libelants were employees rather than fishermen expecting to operate fishing lay.

5. The court erred in finding that said libelant and said intervening libelants were ready, able and willing to continue to perform their fishing contracts, and that they or either of them were wrongfully discharged.

6. The court erred in finding and decreeing that on June 7, 1954, the said libelant and said intervening libelants had valid causes of action against the vessel for damages to the extent of the claimed value of the share of each of them in and to a speculative tuna fish catch.

7. The court erred in finding that the Silver Spray was constructed and equipped as a tuna clipper for fresh bait fishing and refrigeration.

8. The court erred in finding that said libelant and

said intervening libelants had or have causes of action properly instituted in admiralty rather than common law actions for fraud and deceit or money had and received.

9. The court erred in finding and decreeing that said libelant and said intervening libelants are entitled to recover \$7,500.00 each or any amount whatever.

10. The court erred in failing to make specific findings on damages as required by Admiralty Rule 46 $\frac{1}{2}$.

11. The court erred in finding and decreeing that said libelant and said intervening libelants are entitled to maritime liens for seamen's wages.

12. The court erred in decreeing that said libelant and said intervening libelants have superior maritime liens for prospective fishing shares on fish that were not caught.

13. The court erred in failing to find and decree that appellants Putnam and Overman are entitled to a decree foreclosing their preferred ship mortgage as the first and only lien against the Silver Spray, and erred in failing to condemn said vessel and to order its sale to apply the proceeds to the payment of appellants' note and preferred marine mortgage.

14. The court erred in failing to find and decree that said libelant and said intervening libelants should be charged with all costs incurred.

15. The court erred in finding and decreeing that intervening libelant John Kadlec was hired by the owner Tobin to stand watches as a seaman on the shake-down cruise to Alaska; and further erred in finding and decreeing that John Kadlec is entitled to any recovery for wages for the reason that such a finding and adjudication is against the preponderance of credible evidence.

ARGUMENT

As declared at the outset of the Statement of the Case we have not attempted or felt obliged to offer a detailed analysis of the facts. It is clear from the testimony that as events developed, appellees Lower, Peecher and Barquist became convinced that Tobin had attempted fraud and deceit as of the time each contract was executed and the funds changed hands. It is uncontradicted that Lower, Peecher and Barquist elected to withdraw from the fishing enterprise on or before June 4, 1954, and their severance was not due to firing by Tobin. The testimony reveals many instances of misunderstanding and a complete lack of knowledge of tuna fishing by all concerned. Bunker concisely expressed the situation. When asked whether he and Tobin were groping on a new and untried venture, he answered, "I believe the trade name is we were both green beans" (Tr. 210). The chaos was not alleviated by Tobin's puffer talk. As a unit the appellees charge that Tobin's every act was engendered through a plan or scheme to defraud. However, these are not admiralty questions, but issues to be decided by a common law court. If admiralty had any jurisdiction at all, the court could do no more than render a personal judgment against Tobin for damages for wrongful discharge, if there was one, and if damages could have been proven.

Accordingly, the appellants in appealing to this court for the preservation of their marine mortgage are impartial to all the factual differences between Tobin and appellees.

We have emphasized the foregoing facts to prove that

Lower resorted to an in rem action in admiralty on June 10, 1954, as a means to recover his \$2,500.00 paid to Tobin on April 17, 1954.

The libel resulted in Tobin's prevention to resell the shares of Lower, Barquist and Peecher under the contracts, and the appellant mortgagees were compelled to stand by helplessly while the Silver Spray was sold by the marshal at a sacrifice sale of \$11,000.00 (Tr. 87) of which sum all parties stipulated that the marshal be reimbursed for costs to the extent of \$713.65.

As the authorities will demonstrate, the ultimate truth or falsity of wrongful discharge only bears upon the personal recourse that appellees, or any of them, may have against Tobin.

Our presentation of the authorities will be made under the following categories:

- A. Jurisdiction.
- B. Appellees' Liens Are Invalid.
- C. Damages were not Proven.
- D. Kadlec had no Wage Agreement.

A. Jurisdiction

The District Court lacked maritime jurisdiction over Common Law Causes of Action asserted by the libelants, Lower, Barquist, Bunker, Herning, and Peecher.

At the very outset this Court is confronted with a vital question of jurisdiction. The appellants, Putnam and Overman, insist that whatever causes of action the other libelants may have had against Tobin, the owner of the "Silver Spray," such causes of action were essentially common law causes of action for fraud and de-

ceit and hence not within the admiralty jurisdiction of the United States District Court. The claim of Lower, the original libelant, may be taken as typical. In his original libel upon which the vessel was seized by the Marshal (Tr. 1-6), Lower pleaded that on or about April 17, 1954, he was employed by Tobin as a member of the crew of the vessel on a proposed tuna fishing venture; that Tobin failed to carry out the venture as agreed and that in consequence he, the libelant, was entitled to recover \$5,000.00 which would have been his proportionate share of the catch if the venture had not been abandoned by Tobin. Tobin, answering the original libel and the intervening libels of Barquist, Bunker, Herning and Peecher, pleaded a written contract under which these libelants engaged in the proposed tuna venture on a fishing lay basis (Tr. 46-52). Lower replied by denying the validity of the contract and specifically alleged that it was obtained in consequence of fraudulent representations made by Tobin with intent to deceive and hence was null and void and of no effect. That was the vital issue in the case. But however the pleadings may have been framed in the first instance, when the evidence has been taken the pleadings had served their purpose and it is the evidence that must control. The pleadings allege fraud and the uncontradicted evidence, if it proves anything, proves that the real complaint of the so-called shareholders against the owner Tobin is fundamentally a claim for fraud or deceit. The original libelant Lower testified that on April 11, 1954 he was in Hermiston, Oregon and saw an ad in the Portland Oregonian. He went to Spokane and there met Tobin, with whom he had conversations relative to a proposed tuna

fishing operation. He decided to buy a share in the operation and paid Tobin \$2500.00 (Tr. 120-121). Tobin said that he was the sole owner of the boat and Lower put up \$2500.00 relying upon that misrepresentation (Tr. 122).

“Q. (By MR. CAREY) : You are trying to get damages because you claim Tobin deceived you, is that right? A .Yes (Tr. 123).

* * *

Q. At the time you negotiated this contract with Tobin on April 17th and you put up \$2500.00, are you now claiming that Tobin told you the truth or cheated you? A. Cheated me.” (Tr. 123-124)

The intervening libelants above named testified in substance to exactly the same fraudulent misrepresentations on which they relied (Herning, Tr. 158; Peecher, Tr. 178; Barquist, Tr. 203; Bunker, Tr. 212). That this evidence establishes a common law action for fraud, if it establishes anything, cannot be gainsaid. The trial judge, in delivering his oral opinion, admitted that fundamentally the claims of these libelants were founded on fraud perpetrated by Tobin. In the course of that oral opinion, the court said:

“It is possible that such libelant and intervening libelants also had on that day a cause of action at common law against respondent Tobin for fraud and deceit or some other action at law, but on that date such libelant and intervening libelants were not required against their choice to sue upon such causes of action at law, and they did not do so.

“The mere fact that on cross-examination one or more of them may have given testimony tending to evidence a cause of action at law does not in this case prevent the libelant and intervening libelants

from disavowing any request or intention of request for any relief in this admiralty court on any such cause of action at law, and each and all of such libelant and intervening libelants have effectually disavowed any such intent through their counsel who have a right to speak for them." (Tr. 279-280)

This erroneous view is the very foundation of the Decree that the court ultimately entered (See Finding of Fact XIX, Tr. 68). The trial judge thus recognized the jurisdictional obstacle but sought to avoid it because the evidence was elicited on cross-examination, but uncertain as to the sufficiency of that ground, the trial court resorted to an even more untenable ground by holding that although the libelants' causes of action were common law actions for fraud, nevertheless they have disavowed "through their counsel who have a right to speak for them."

We believe it is a novel suggestion that undisputed and indisputable evidence can be completely discarded because and only because it has been elicited on cross-examination. What is cross-examination for if not to develop the facts in general and jurisdictional facts in particular? In the next place, we think it is an even more novel proposal to suggest that a common law action for fraud can be converted into a maritime cause of action, creating a maritime lien superior to an admittedly valid preferred ship mortgage, by the simple expedient of a disavowal by counsel. It is unnecessary to cite decisions from other circuits for the question has already been definitely decided in this circuit by several decisions holding that an admiralty court has no juris-

diction unless the real and substantial controversy is *wholly maritime*. A maritime color lurking in the background is not sufficient.

Home Insurance Company v. Merchants Transportation Company, 12 F.(2d) 931 (D.C., Wash.);

Home Insurance Company v. Merchants Transportation Company, 16 F.(2d) 372 (9th Cir.);

Westfull, et al., v. Tug Boat Company, 73 F. (2d) 200 (9th Cir.).

These decisions from this circuit were called to the attention of the trial judge and no decisions to the contrary were cited or can be cited. If, as claimed, Tobin defrauded Lower and the intervening libelants, their actions were common law actions for fraud or deceit or possibly for money had and received. In either event, there is no jurisdiction in admiralty. Certainly there is no jurisdiction to subordinate a preferred ship mortgage, the validity of which is admitted, because the alleged fraud of the mortgagor is in no way shown to be chargeable to the mortgagees.

In thus assuming that these libelants by disavowal of counsel could effectively convert a common law action for fraud into a maritime cause of action, we believe the trial judge became confused as to the applicable statutory provisions relative to maritime jurisdiction. The jurisdiction of the United States District Court in Admiralty is limited to maritime causes of action. The original Judiciary Act of 1789 gave the United States District Courts exclusive jurisdiction over admiralty and maritime causes of action but saving to suitors "the right of a common law remedy where the common law is

competent to give it." The phraseology of that jurisdictional statute has been changed from time to time but in substance it has always remained the same. It now reads:

"The district courts (of the United States) shall have original jurisdiction, exclusive of the courts of the States of:

"(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." (United States Code Annotated, Title 28, Section 1333, page 575)

A party having a maritime cause of action may, at his election, sue in a common law court but the converse is not true. A party having only a common law cause of action cannot sue in admiralty. The admittedly valid preferred ship mortgage must be given priority without regard to the claims of Lower, et al., that they were defrauded by Tobin.

The intervening libel of Kadlec is on a somewhat different footing. He claims wages as a seaman for services performed on the trip from Seattle to Ketchikan and return, but as will be shown in another place, his evidence wholly failed to show that he was engaged as a seaman by Tobin.

B. Appellees' Liens Are Invalid

Fishermen do not have liens against a vessel for fish that were never caught, and particularly for speculative earnings that might accrue after seizure.

Regardless of the cause of severance of a fisherman from his vessel, and whether right or wrong, and regardless of his right to recover personally against the

owner or master, he cannot seize a vessel and impose a maritime lien *in rem* for a share on fish that were never caught, sold or accounted for. Under no circumstances may a fisherman lien a vessel for any earnings that might have been made from and after the date of seizure by a marshal, and this is particularly true where the libelant fisherman himself causes the attachment.

Generally, a vessel may not be libeled for speculative shares, but only against the vessel for shares of the catch that has been made, brought safely to port and ascertained and liquidated. The same principle applies to any type of vessel with a crew working on a profit-sharing basis:

Reed v. Hussey, Fed. Cas. No. 11,646 (D.C. N.Y.);

Williams v. The Sylph, Fed. Cas. No. 17,740 (S.D.N.Y.).

When a vessel does not engage in the voyage, it cannot be libeled for future earnings, and this is particularly true in those instances where the seizure is caused by the crew:

Sigurjonsson v. Trans-American Traders, 188 F.(2d) 760 (5th Cir.);

Vlavianos v. The Cypress, 171 F.(2d) 435 (4th Cir.).

Though a seaman is hired to safeguard the vessel after seizure and during the lay-up period even then he cannot libel the vessel but must pursue the person who hired him:

Bromfield Mfg. Co. v. The Brown, Smith & Jones, et al., 117 F.Supp. 630 (D.C. Mass.).

The leading case on the lien issue and upon which appellants greatly rely, is *Old Point Fish Co., Inc., v. Haywood, et al.*, 109 F.2d 703 (4th Cir.) In anticipation that the Court will study the opinion, we will not extend this brief by relating the complete facts and legal conclusions. However, the following excerpt may be pertinent at this time as it reflects the thinking of all authorities in point:

“In accordance with the general rule that maritime liens do not arise from matters happening subsequent to the legal seizure of the ship, it has uniformly been held (in the absence of an applicable statute or duly authorized continuing services of seamen) that no maritime lien can be allowed for wages to seamen accruing after the libeling of the ship. * * * (Cases cited) * * * In Benedict on Admiralty, 5th Ed., 585, the rule is stated that ‘seizure of a vessel under process, resulting in breaking up the voyage, operates as a discharge of the crew who, therefore, have no lien for further wages.’

* * * * *

“In the instant case it is clear that the crew earned nothing from the catch up to the time of the seizure of the ship, and they performed no services thereafter, but apparently recognized the breaking up of the enterprise by the filing of their libel claims. See *The Nissegogue, supra*; *The Charles L. Baylis* (D.C.) 25 Fed. 862. Whether, if the fishing enterprise had not been broken up, they would subsequently have earned compensation for their share of the catch and if so the amount thereof, was wholly speculative, uncertain, and dependent upon future happenings. If they had been employed for a definite period at a definite wage they would not

have been entitled to a prior lien for the wages accruing after the seizure of the ship, even though the amount were certain. A *fortiori* they were not entitled to a prior lien for compensation which might have been earned from a future catch wholly speculative in amount." (P. 705)

The trial judge announced that the *Haywood* case was contrary to his own inclinations (Tr. 288, 289) and invited counsel to produce conflicting authorities. None were forthcoming, nor can there be. Thus through independent research the trial court located *Carborne v. Ursich*, 209 F.2d 178 (9th Cir.), and by applying it felt that Tobin had committed a maritime tort (Tr. 288). We utterly fail to see any resemblance of that case to the one at bar. There the offending vessel ran into and damaged a net and the fishermen on the other vessel recovered damages equal to the four days required to repair the net. However, their right to damages was not in issue. The entire opinion by the court was directed to whether the fishermen had a cause of action in their own names or whether it had to be brought by the owner of the net.

Neither does this case come within sound decisions which hold that a wrongfully discharged seaman may, at the end of the season, impose a lien against a vessel for his share of the profits on fish that have been caught.

Appellants do not condone Tobin's handling of the Silver Spray fiasco, but neither do we believe that appellees used ordinary sound business prudence in engaging in the venture. Appellees and Tobin knew from the beginning that none of them had ever tuna fished before. Tobin made no attempt to abscond with the

investments and offered to account for every penny at the trial. Our point now is that under our authorities and the share contracts, he could have dismissed all appellees, and had he done so they would not have a lien for future shares. And regardless of whether they were or were not wrongfully discharged, there can be no recoveries against the vessel for future speculative shares from June 10, 1954, when Lower libeled the vessel.

C. Damages Have Not Been Proven

Appellees' proof of damages related to vessels used as tuna clippers. By the admission of their own expert witness, such testimony had no bearing on the probable profits of a jig rigged boat like the Silver Spray.

We have the deepest respect for appellees' witness Hervey Petrich, who admittedly has vast experience with the bait boat clipper industry. On direct-examination Petrich proceeded to describe the large catches of a tuna clipper, though in reviewing his testimony we fail to find an exact figure for the 1954 season. In any event the probable catch for a large bait boat has no relationship to a jig boat like the Silver Spray. This witness testified that there is a difference between a bait boat and a jig boat and the latter is never referred to as a clipper. He explained that a jig boat is actually a small trolling vessel and usually carries about three men (Tr. 190). Upon being handed a photograph of the Silver Spray he at once declared that the vessel was not a bait boat and his testimony had no relationship to jig fishing (Tr. 188-189). Previously he testified that he had never seen the Silver Spray and did not know her capacity or suitability for catching tuna. We believe the trial

judge erred in finding (Tr. 280, Findings of Fact XVII, Tr. 68) that the Silver Spray was a tuna clipper when Petrich said it was not.

Bait tanks and refrigeration installed in the Silver Spray could not have changed the hull construction or her carrying capacity. Tobin's representations as to these factors could not convert the comparatively small catches of a jig troller into the huge tonnage of a clipper. If Tobin's calling the Silver Spray a "clipper" meant anything, it meant that appellees might only use such a representation as a further element of fraud in a common law action.

Petrich frankly admitted that he could offer no figures as to any catch for the Silver Spray. He was not aware that neither Tobin or the appellees had never tuna fished before. It is inconceivable that he would imply under oath that these parties would fare as well, or fare at all, as fishermen with many years' experience. Regardless of whether the Silver Spray is a clipper or a jig or a seiner, these appellees cannot use Petrich's extensive fishing experience as their own, for unlike Petrich they have never tuna fished before.

This truism is established by the decisions of the State of Washington wherein the contracts were executed:

In *Webster v. Beau*, 77 Wash. 444, 137 Pac. 1013, the plaintiff and defendant entered into a partnership venture to establish a new fur trading business in Alaska but the defendant refused to comply with the contract. Among other causes the plaintiff sued for loss of future

profits. With reference to speculative damages, the court observed:

“It did not pertain to any existing business. Any loss of profits would necessarily mean the loss of such anticipated profits as might possibly be earned in the future from a business not yet created, installed or conducted. *There was no going business which had previously earned profits sufficient to form a basis upon which to estimate probable future profits.* * * * It is common knowledge that parties expecting profitable results frequently enter upon business enterprise which terminate in failure.” (P. 449, Emphasis supplied)

“The doctrine is equally well established that a loss of prospective profits will not become a basis of recovery in an action upon the breach of a contract to launch a new venture or business.”

Quoting from a Kansas decision:

“ * * * it must be made to appear that the business was an one—that is, that it had been successfully conducted for a length of time and had such a trade established that the profits thereof are reasonable and ascertainable.”

In accord are:

Lockit Cap Company v. Globe Mfg. Co., 158 Wash. 183, 290 Pac. 813;

Carolene Sales Co. v. Canyon Milk Products Co., 122 Wash. 220, 210 Pac. 366;

Catarau v. Sunde & d'Evers Co., 188 Wash. 592, 63 P.2d 365.

In furtherance of our objections to damages, and as to whether they were properly assessed, we do not believe that Rule 46½ of the Rules of Practice in Admir-

alty and Maritime Cases was complied with. This rule requires that specific findings must be made. No one can be sure as to the District Court's method in arriving at a gross recovery for each appellee in the sum of \$7500.00. They only asked for \$5000.00. At best we may only speculate as to the source of the remaining \$2500.00. Our best guess is that the trial court was refunding appellees' investments on the share contracts. He could not have done so on the theory of enforcement of the contracts for it is admitted that appellees, or some of them, refused to perform by giving the required thirty days' notice, thereby permitting Tobin to have ninety days to re-sell shares. Thus the only other foundation for awarding \$2500.00 to each appellee must have been because at the moment the District Court was sitting as a court of common law and chose to refund these amounts on the common law principles of fraud and deceit.

Our suppositions may be completely out of order, but when rule 46 $\frac{1}{2}$ is not complied with there is nothing left but conjecture and speculation as to the probabilities.

D. Kadlec Had no Wage Agreement

Kadlec's wage agreement is contrary to the preponderance of credible evidence.

Kadlec's wage claim is unworthy of belief. The excerpts appearing below from his testimony should be sufficient to deny him relief. There were at least nine other men on board for the Alaska trip. Of them, Lower had been in the navy during the war. Moore and Gehrig were licensed in the coastal trade. Herning and Tobin

had been on small boats in Alaska. Helwig was a licensed engineer. At the most, a captain and any two of these men would normally handle the lines on a 77-foot vessel. It is preposterous to assume that Tobin would hire Kadlec as a deckhand under such circumstances, particularly on April 14, 1954, when he did not even own the Silver Spray. Kadlec contradicted himself by saying he had been hired on a wage basis when he had previously testified that he could go along with the Silver Spray if he bought into it. His memory is faulty on a number of things but particularly when he claims part of his duties was standing a regular watch. He could not remember which watch. If he stood a regular watch he would know the hours as surely as a Boeing employee would know whether or not he had been on the swing shift for the past month or so. No one knew of his salaried position. Though Tobin had funds on the way up to Alaska and when back in Seattle, Kadlec made no effort to demand the claimed weekly wage. In Seattle he left the boat for all time and never claimed wages due. Nor did he ask Swontoski. He and Swontoski only discussed \$150.00 for what Kadlec claimed was due on the Sockeye. Nor did he tell his first proctor about such an arrangement. It was not until the second day of the trial that he made the claim contrary to the allegations of his original intervening libel.

The appellants contend the evidence overwhelmingly proves that Kadlec and Tobin did not have a seaman's wage agreement for the Silver Spray:

1. As of April 14th, the date of the Sockeye share agreement, Tobin did not own the Silver Spray, but was merely planning to purchase it (Tr. 139, 215).

2. Kadlec understood that he would receive \$100.00 a week providing he bought a share on the Silver Spray (Tr. 134). He did not do so. It is likely Tobin meant and Kadlec understood that such earnings would be shares of the catch.

3. Kadlec had little experience handling vessels (Tr. 133).

4. Kadlec knew the captain and cook were on wages but he made no mention of the alleged wage contract to anyone (Tr. 139).

5. Kadlec's libel was filed July 26, 1954, but he did not tell his attorney, Robert C. Wells, about a wage agreement (Tr. 217).

6. When the vessel had returned, Kadlec claims he talked with Mr. Swontoski and talked about wages on the Silver Spray (Tr. 216).

7. Mr. Swontoski denies this and testified that Kadlec felt Tobin owed him \$150.00 for working on the Sockeye and he would waive his investment of \$500.00 if the \$150.00 were paid; further, no claim was made against the Silver Spray (Tr. 222, 223).

8. On cross-examination Kadlec admitted he never discussed the Alaska trip with Tobin but found out about the Alaska voyage from other men on board. Not having discussed the trip, he could not explain how he had a wage agreement (Tr. 218).

9. Tobin emphatically denies a wage contract (Tr. 225).

Appellants submit that though he had the burden of proof, the preponderance of the evidence is against Kadlec; any doubts should be resolved in favor of the first preferred marine mortgage.

CONCLUSION

A court of admiralty sits in equity. The appellants handed a valuable vessel to Tobin and took back a first preferred mortgage, valid in all respects. They were entirely innocent of all dealings between Tobin, appellees and Kadlec. On the other hand, appellees entered into this venture with knowledge of the risks, and they were in a position to fully acquaint themselves with their rights and remedies during the voyage to Alaska and upon their return to Seattle. Under the law of maritime liens and of speculative damages, as applied to the facts and circumstances, we are at a complete loss to understand how the District Court was able to ignore appellants' bona fides, and enter a decree which resulted in a substantial loss to and devaluation of appellants' security.

For the reasons set forth we ask that the decree of foreclosure of the mortgage be affirmed but otherwise it be set aside for complete lack of jurisdiction in the District Court. Or should not that be the pleasure of this Court, then that the decree be reversed on the merits.

Respectfully submitted,

WILLIAM H. BOTZER

PEYSER, CARTANO, BOTZER & CHAPMAN
Proctors for Appellants.



No. 14645

**United States Court of Appeals
For the Ninth Circuit**

FRED I. PUTMAN and JAMES A. OVERMAN, *Appellants*,

VS.

HARRY C. LOWER, JOHN KADLEC, GEORGE S. HERNING,
EDGAR L. PEECHER, WILLIAM E. BARQUIST and
NORMAN L. BUNKER, *Appellees*.

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NORTHERN DIVISION

BRIEF OF APPELLEES

M. BAYARD CRUTCHER,
BOGLE, BOGLE & GATES,
Proctors for Appellees.

603 Central Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

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STATEMENT OF JURISDICTION

These suits were brought by crewmembers against vessel and owner for wrongful discharge and for wages due—they were properly brought in admiralty

The original libel and four intervening libels in this case were filed in the United States District Court for the Western District of Washington, Northern Division, by former members of the crew of the fishing vessel SILVER SPRAY. These men—the appellees here—alleged that they had been hired by the SILVER SPRAY's owner to fish on shares for the 1954 tuna season, and that the owner had wrongfully discharged them (Libels: Lower, Tr. 4, 5, pars. III, V, VII; Herning, Tr. 28, 29, pars. III, V, VII; Peecher, Tr. 24, 25, pars. III,

V, VII; Barquist, Tr. 21, 22, pars. III, V, VII; Bunker, Tr. 17, 18, pars. III, V).

One crewmember, Kadlec, was permitted to amend his claim to conform to the proof (Tr. 214), and showed that he had earned agreed wages of \$100.00 a week while working aboard the SILVER SPRAY, which were unpaid. He did not claim any wrongful discharge.

The respondent vessel SILVER SPRAY was regularly seized pursuant to the prayer of Lower's libel (Tr. 7, 8). The respondent owner, Robert J. Tobin, appeared in the actions to claim and defend the vessel (Tr. 46 *et seq.*).

The appellants, who held a preferred ship mortgage on the vessel, intervened for their interest (Tr. 33 *et seq.*).

The trial court found, in answer to the same arguments now being advanced upon appeal, that these libellant crewmembers had valid causes of action for damages, both against the SILVER SPRAY and against her owner (Findings XVII, XVIII, Tr. 68), and that they had maritime liens for their respective damages, of the same nature and rank as for seamen's wages (Findings XX, XXI, Tr. 69).

The district court properly concluded that this proceeding was within its admiralty and maritime jurisdiction (Conclusion I, Tr. 73), and entered a decree awarding damages to each of the libellant crewmembers against both the SILVER SPRAY and its owner (Tr. 78, 79). The court likewise decreed foreclosure of appellants' mortgage, with costs (Tr. 79, 80), but subordinated their lien (Tr. 81).

The vessel was subsequently sold by the Marshal, for a sum much less than the judgments against her (Tr. 87). The proceeds remain in the registry of the court, the decree for the crewmembers having been superseded by the appellant mortgagees (Tr. 88).

STATEMENT OF THE CASE

Since the statement by appellants is not correlated to the pleadings or the findings, and does not fairly summarize the status of this case on appeal, we are obliged to provide a statement of our own.

1. The Suits for Wrongful Discharge

As previously noted, the appellees Lower, Herning, Peecher, Barquist and Bunker were hired on shares by the owner of the vessel SILVER SPRAY to fish for tuna during the 1954 season, off the coast of Southern California (Findings III, V, VII, IX, XI, Tr. 64, 65, 66).

They went to work aboard this vessel, each at a different time (Findings IV, VI, VIII, X, XII, Tr. 64, 65, 66).

Thereafter the respondent owner and operator, Tobin, abandoned the vessel and the fishing enterprise, effecting a wrongful discharge of these men (Finding XV, Tr. 67). This abandonment was through no fault of the crewmembers (Finding XVI, Tr. 68).

The case is unusual in several respects.

First, the vessel owner did not seek fishermen in the customary way. He solicited them through newspaper advertisements (Tr. 96, 133, 144, 161, 192, 225).

A typical want ad is in evidence as Exhibit 3:

“Commercial Fishing

“Tuna boat leaving for southern waters, \$2,-500.00 required. No investment risk. Must be dependable. Write 17-40 Times.”

As this ad implies, each of the appellees was required to advance funds to the vessel owner as a condition of employment (Exs. A-1, A-5, A-6, A-7, A-8; Tr. 259, 260). Mr. Tobin explained at the trial that the purpose of this money was to outfit, provision and operate the SILVER SPRAY (Tr. 251). Such advances did not give the crewmembers any right or interest in the vessel itself (Tr. 247), or even any voice in its management (“working share agreement,” Tr. 50, clauses 2, 3, 4).

A second unusual fact is that the vessel owner did not “fire” any of the libelants—he first ignored the agreements he had made with them, and then actually abandoned them.

Instead of taking the SILVER SPRAY south to fish, he took it north to Alaska, for a “shakedown” and supposedly to pick up a load of shrimp at Wrangell (Tr. 99, 236). This was not a voluntary departure, so far as most of the sharesmen were concerned.¹ Tobin debarked before they reached Wrangell (Tr. 112), and when no load of shrimp materialized (Tr. 194, 195) he instructed the master to look for cargo to haul *in Alaska* and then flew south (Tr. 102). The crew heard from the

¹HERNING was not asked whether he would agree to go to Alaska (Tr. 147). PEECHER objected to Tobin that wasn’t what he came aboard for; “I come aboard the ship to go to San Diego on a tuna fishing trip” (Tr. 166). BARQUIST was not asked; “I didn’t have any say about it” (Tr. 194). LOWER consented to go north, with the understanding the vessel would return and go tuna fishing (Tr. 111). BUNKER had not yet been hired.

master that Tobin had “ditched” them (Tr. 140). This was what they believed (Tr. 176).

While Tobin pretended to pick up the tuna venture later (Ex. A-2), actually he did nothing (Tr. 254, 255). When the SILVER SPRAY arrived back in Seattle on June 3, 1954, he covertly removed his personal effects (Tr. 136, 169, 196) and retreated to Spokane. Tobin’s business agent suggested that the crewmembers “incorporate” (Tr. 106). Tobin could not be reached (Tr. 107, 128). Even his agent had a difficult time in getting him back to Seattle for a final meeting with members of the crew (Tr. 273).

When Tobin finally did come back on June 7, three weeks after the scheduled departure for San Diego (Tr. 97), Barquist asked him, “What are we going to do now?” Tobin only answered, “Go up to my attorney and get your money” (Tr. 197).²

Lower filed the first libel, three days later (Tr. 7), and the other crewmembers followed suit.

The other unusual aspect of this case, is, of course, that the fish catch which was to compensate the crewmembers under their agreements with the vessel owner was entirely prospective.

(a) The issue of jurisdiction

In his Answer, the vessel owner set up certain terms of the contracts originally signed by each of these crewmembers (Exs. A-1, A-5, A-6, A-7, A-8) as an affirmative defense to their claims (Tr. 47, 49, 50, 51).

²Tobin’s own witness confirmed this (Tr. 273). All that BARQUIST got from the lawyer was a legal opinion (Tr. 198).

Crewmember Lower replied, alleging that Tobin had made certain material representations to induce him to sign the contract (Tr. 52, par. II). The reply continued :

“The aforesaid representations by respondent were false, and were made by him with intent to deceive libelant so that the said writing prepared by respondent and then executed by libelant as aforesaid, and as alleged by respondent in answer to the libel, is null and void, and of no effect.” (Tr. 53, par. III)

Similar replies were made by the intervening libelants Bunker (Tr. 55, 56, pars. II, III), Peecher (Tr. 59, 60, pars. II, III) and Barquist (Tr. 61, 62, pars. II, III).³

It will be readily apparent, from the foregoing, that the issue of deceit was raised to dispute the respondent vessel owner's contention that the alleged contracts represented the true agreement with each of these crewmembers.

Appliants contend, in sweeping generalities, that because this incidental issue of deceit was raised, and because on cross-examination some of the crewmembers admitted they thought Tobin had cheated them, and that they wanted back the money they had given him, the whole character of the crew's claims was changed into a common law action for fraud and deceit (Brief, pages 14 *et seq.*).

The trial court concluded that the crewmembers were entitled to their remedy in admiralty (Oral opinion, Tr. 279, 280), and so found (Findings XVII, XVIII, XIX, Tr. 68).

³Crewmember HERNING is not concerned with this question, since he did not make such an allegation in his reply (Tr. 57).

(b) Appellants contend that fishermen on shares, wrongfully discharged, cannot libel their ship before the end of the season, and that in any event they have no maritime lien for their damages

As previously noted, the trial court held that the libellant crewmembers had maritime liens for their respective damages, of the same nature and rank as for seamen's wages (Findings XX, XI, Tr. 69).

Appellants contest this ruling, on two grounds:

(1) The damages related to prospective fishing after the date the SILVER SPRAY was seized (Brief, p. 20 *et seq.*).

(2) The measure of damages is speculative (Brief, page 20).

(c) Appellants contend that the damages for wrongful discharge were not proven

The trial court found that these crewmembers had been employed under certain terms. The SILVER SPRAY was to be equipped as a clipper, with fresh bait tanks and refrigeration. It was to fish for tuna throughout the 1954 tuna season, operating from Southern California. Each man was to receive one-tenth of the season's catch as his share (Findings III, V, VII, IX, XI, Tr. 64, 65, 66).

The court further found that the measure of damages for wrongful discharge was the prospective value of a share in the catch which might reasonably have been expected had Tobin fulfilled his agreements (Oral opinion, Tr. 280), and fixed that value at \$7,500.00 (Finding XX, Tr. 69).

The actual damages awarded took into account individual earnings and prospective earnings from other sources up to the end of the tuna season (Finding XXII, Tr. 69, 70; Stipulation, Tr. 292, 293).

Appellants attack Finding XX (the value of each prospective share), implying at page 26, of their brief that there was no substantial evidence upon which to base the figure of \$7,500.00, and asserting that the Finding does not suffice under Admiralty Rule 46½, 28 U.S.C.A.

2. The Suit for Unpaid Wages

One crewmember, Kadlec, was not hired for the entire tuna season, nor would he have been entitled to a share of the catch. As has been previously noted, he was hired for wages, and maintained his action at the trial of this case to recover the unpaid balance. He prevailed (Findings XIII, XIV, Tr. 67).

Appellants make an argument that these findings are contrary to "the preponderance of the evidence" (Brief, pages 26 *et seq.*).

ARGUMENT

1. The findings of fact are supported by substantial evidence. Particularly,

(a) there is convincing evidence of the prospective fishing shares which would have been earned had the vessel owner fulfilled his agreements, based upon minimum average catches of similar tuna boats in prior years; and

(b) the finding thereon was sufficient in form, under a late decision of this court, *Griffith v. Gardner*, 196 F.2d 698;

(c) the wage agreement with appellee Kadlec was clearly proven—Tobin's testimony on this point was preposterous.

2. The trial court properly applied the law.

(a) The fact that the vessel owner has deceived or cheated his crew does not exclude them from their admiralty remedy for wrongful discharge. Admiralty's traditional solicitude for seamen makes this conclusion obvious. Appellants cite no case even suggesting their contrary view.

(b) Appellees have a maritime lien for their damages.

(1) That fact that the vessel is attached before the end of the fishing season is immaterial, since the wrongful discharges were effected before, and not as a result of, the attachment. A seaman has a lien for his damages for wrongful discharge, which he can enforce immediately. *Vlavianos v. The Cypress*, 4th Cir., 171 F.2d 435. The fact that damages relate to prospective earnings after attachment is immaterial. *The Heroe*, D.Dela., 21 Fed. 525.

(2) The trial court followed prior decisions of this

court, and other respected admiralty precedents, in estimating damages by reference to prospective catches. *Carbone v. Ursich*, 209 F.2d 178; *Van Camp Sea Food Co. v. DiLeva*, 171 F.2d 454, and *United States v. Laflin*, 24 F.2d 683, all allowed such damages. Dictum to the contrary in the majority opinion of *Old Point Fish Co. v. Haywood*, 4th Cir., 109 F.2d 703, is neither authoritative nor persuasive.

I. The Findings of Fact Are Supported by Substantial Evidence

We note at the outset that appellants have failed to comply with Rule 18. 2. (d) of this Court, requiring that where findings are attacked the appellants state particularly in the specification of errors wherein the findings are alleged to be erroneous.

Not one of the specifications refers particularly to the alleged error in any given finding of fact by the trial court (except perhaps Findings XIII and XX), nor is any specification mentioned in appellants' argument.

Under these circumstances appellees should not be required to assume the burden of justifying each finding by reference to the many items of evidence which go to make it up, merely because the appellants pick at it indirectly with generalities and fragments of testimony.

All of the witnesses testified in open court. The testimony of the libelant crewmembers abundantly supported the findings by the trial court (a) that they were individually hired to work aboard the SILVER SPRAY on shares, upon the terms stated in the Findings, (b) that they went to work on the vessel and (c) that the owner soon afterwards left the SILVER SPRAY, in Alaska, and

by his actions thereafter showed that he did not intend to return or to put the vessel to tuna fishing.⁴

We do not understand that the appellants themselves seriously question these basic findings. They say that they are impartial to the differences between owner and crewmembers, and that this can only affect the remedy of the crew against Tobin personally (Brief, pages 13, 14).

A. There is substantial evidence to support the finding of damages for wrongful discharge

The first finding of fact specifically pointed out and challenged by appellants is Finding XX, at pages 23 *et seq.* of their brief.

The relevant part of this Finding reads as follows:

“That the value of each of said shares referred to in finding number XV was and is the sum of \$7,500.00, * * *.”

Appellants complain (specification 3, Tr. 84) that the crewmembers failed to prove *any* damages.

Following is a summary of evidence as to the prospective tuna catch of the SILVER SPRAY, had her owner carried out his agreements with the crew.

(a) *Capacity*—The SILVER SPRAY had a hold capacity of approximately 70 cubic tons (Tr. 205).

(b) *Equipment*—This vessel was represented to the crewmembers as a clipper (Exs. A-1, A-5, A-6, A-7,

⁴This general statement is not accurate as to libelant BUNKER. He was not hired until June 2, 1954, and he went aboard the vessel only on June 3, the day that the SILVER SPRAY arrived back in Seattle (Findings XI, XII, Tr. 66). However, his situation is essentially the same.

A-8), which means that she was to be fitted with tanks to carry live bait, and, normally, refrigeration (Tr. 181). The owner represented to the crew members, when he hired them, that the SILVER SPRAY was to be so fitted (Lower, Tr. 97; Herning, Tr. 145; Peecher, Tr. 162; Barquist, Tr. 192; Bunker, Tr. 206). This proper equipping of the vessel was indeed an integral part of the hiring agreements (Findings III, V, VII, IX, XI, Tr. 64, 65, 66).

(c) *Experience*—The vessel owner represented that he had had several years of commercial fishing experience (Tr. 210). He told the libelants that two experienced tuna fishermen would be aboard (Tr. 147, 162, 163, 193, 194).

The libelants themselves had had no tuna fishing experience, but they were well equipped to handle the ship. Herning had been a commercial fisherman (Tr. 143). He also had experience with diesel engines, and served as engineer (Tr. 143, 146). Bunker was a licensed master (Tr. 204). Lower and Barquist had both had sea experience in the Navy (Tr. 96, 191). Peecher was quite familiar with vessels (Tr. 161). Kadlec had served briefly in the merchant marine (Tr. 133).

The one voyage that these men made as a crew was well handled, as the owner himself stated (Ex. A-9).

(d) *Market*—As to every libelant crewmember, the vessel owner, Tobin, represented that he had a contract with Van Camp Sea Food Company's cannery in San Diego, for tuna fishing (Tr. 97, 145, 162, 192, 206).

(e) *Size and nature of prospective catch*—An expert

witness, Hervey Petrich, testified for the libelant crewmembers. The following points were established.

Tuna clippers the size of the SILVER SPRAY are being operated in this industry (Tr. 182). The average catch for vessels of this size varies from 250 tons to 300 tons per season (Tr. 184). The catch consists of both yellow fin and skip jack, in the proportion of about 40-60 (Tr. 184, 186).

The run of tuna off the coast of Southern California in 1954—up to the time of trial in the middle of September—had been exceptionally good (Tr. 185).

(f) *Price of prospective catch*—The witness Petrich established that the 1952-1953 average market price for yellow fin and skip jack combined was about \$300 per ton (Tr. 184, 185, 186). The 1955 average market price up to July 27 of 1954 was up, “higher than it has practically ever been in the industry” (Tr. 185, 186). Since that date, it had remained at the level of previous years’ averages (Tr. 186).

(g) *Computation of shares*—The trial court did not announce how it computed the damages, but the following computation is clearly within the evidence:

250 tons (minimum average season catch for vessels of this size) x \$300 (1952-1953 average price for yellow fin and skip jack) equals \$75,000, of which, under his agreements, the owner was to pay the sharesmen one-tenth each (Findings III, V, VII, IX, XI, Tr. 64, 65, 66), or \$7,500.

This figure conforms to estimates which the vessel owner himself made to one of the crew members—“anywhere from \$7,500 to \$12,000 a year” (Tr. 199).

(h) *Conclusion*—There is probative and substantial evidence in the record to support the trial court's figure of \$7,500 as the reasonable value of a one-tenth share of the SILVER SPRAY's catch had her owner carried out his actual agreements with the libelant crewmembers.

Moreover, appellants are scarcely in a position to object to the findings on prospective fishing. Although they were former owners of the vessel they neither took the witness stand nor offered any evidence whatsoever to aid the court on this difficult question.

B. The finding of damages is sufficient under General Admiralty Rule 46½

Appellants assert that Finding XX (Tr. 69) does not comply with Rule 46½ of the Supreme Court Rules of Practice in Admiralty, 28 USCA (Specification 10, Tr. 85; Brief, pages 25, 26).

This Rule provides:

“In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; * * *.”

The apparent objection is that the trial court did not explain the factors which entered into its estimate of the prospective catch. But no such explanation is required of a district court in its findings.

In *Griffith v. Gardner*, 9th Cir., 1952, 196 F.2d 698 (wrongful death and personal injury suit against excursion-boat owner), the district court's findings were challenged as being only an expression of its ultimate

conclusions from the evidence. Appellants claimed that the court was avoiding the requirements of Admiralty Rule 46½.

In rejecting appellants' argument, this Court made a clear statement of the function of a finding of fact.

“ * * * The phrase ‘finding of fact’ may, and in this case we think does, reflect the ultimate judgment of the court on a mass of details involving not merely trustworthiness of witnesses but other appropriate inferences that were drawn from living testimony which elude proof in a cold appellate record. A finding of fact depends on the nature of the materials on which the finding is based and the expression itself may be a summary characterization of complicated factors of varying significance for judgment. Thus, a conclusion by way of reasonable inference from the evidence, is a ‘finding of fact.’ ”
196 F.2d 701.

This ruling follows the decision from the Second Circuit, *Petterson Lighterage & T. Corp. v. New York Central R. Co.*, 2d Cir., 1942, 126 F.2d 992 (collision):

“Findings should not be discursive; they should not state the evidence or any of the reasoning upon the evidence; they should be categorical and confined to those propositions of fact which fit upon the relevant propositions of law.” 126 F.2d 996.

C. There is substantial evidence to prove Kadlec's wage agreement

The other Finding of Fact specifically pointed out and challenged by appellants is Finding XIII, their Brief, pages 26 *et seq.*

This finding is as follows:

“That on or about April 28, 1954, the intervening libelant John Kadlec commenced working on board the said vessel at the Port of Seattle as a member of its crew, for an agreed wage of \$100 per week. That the said intervening libelant thereafter continued to serve on board said vessel as a member of its crew until on or about June 3, 1954.” (Tr. 67)

Appellants complain that the proof of this agreement is against the preponderance of the credible evidence (Specification 15, Tr. 86).

In fact, the wage agreement to which Kadlec testified was the only sensible explanation for what happened.

Kadlec paid Tobin \$500 for a “working share” in the fishing vessel SOCKEYE, *i.e.*, a one-third share of the catch (Tr. 225; Ex. A-10).

Kadlec testified to his meeting with Tobin, and continued:

“Then Mr. Tobin showed me a picture of the SILVER SPRAY. He said: ‘I am planning on purchasing this boat.’ And he was telling me all about what a good boat—and he said: ‘If I decide to put you on this boat, that is where you will be,’ he said, ‘because you only have \$500.00 in this, and I want to put you wherever you are needed.’ * * * (Tr. 138, 139)

Q. (Cross-examination by Mr. Collins) Well, excuse me. On the morning of the 14th you gave him \$500.00, and you signed a contract on the SOCKEYE, and that was the entire conversation at that time?

A. Mr. Tobin also told me that if he decided to put me on this SILVER SPRAY, which he showed me a picture of, that I would work for \$100.00 a week. * * * ” (Tr. 139)

Two weeks later Kadlec went to work for Tobin on the SILVER SPRAY, approximately April 28, 1954 (Tr. 134). He was assistant engineer on the voyage to Ketchikan, standing a regular watch (Tr. 134). He served a regular watch as helmsman during the remainder of his service, until June 3, 1954, when the vessel arrived back in Seattle (Tr. 135, 104).

He was not formally discharged; he simply could not find Tobin (Tr. 136). The only pay he had received was an advance of \$5.00 (Tr. 135).

At the trial the vessel owner took the remarkable position that Kadlec had no wage claim (Tr. 225, 251)—that Kadlec was simply volunteering his services (Tr. 251)!

The only explanation proffered by Tobin for this phenomenon was that Kadlec had a wonderful attitude (Tr. 225).

It is small wonder that the trial court believed Kadlec rather than Tobin (Oral opinion, Tr. 278).

II. The Trial Court Properly Applied the Law

A. An incidental issue of deceit did not defeat the court's admiralty jurisdiction

The affirmative allegations of deceit by the libelant crewmembers⁵ were made only to avoid the respondent Tobin's alleged defenses under the terms of his "working share and contract." See pages 5, 6, *supra*.

This move by the libelants was made to avoid the rule

⁵The following argument does not apply to HERNING, who did not make such an allegation, nor to KADLEC, who relied simply upon an oral wage agreement with the vessel owner.

against parol evidence, which might otherwise have prevented them from testifying as to the true terms of their respective engagements.

For example, Clause 4 of the "working share and contract" (Tr. 50) might have excluded proof of the alleged understanding between Tobin and Lower, that the SILVER SPRAY was to leave on about May 15, 1954, for the season's tuna fishing off the coast of Southern California (Libel, par. III, Tr. 4).

Upon the trial, however, neither Tobin nor the appellants offered any objection to the testimony given by the crewmembers.

The question of deceit, therefore, as a legal issue, became irrelevant. Only the appellants sought to continue it as an issue, on cross-examination of the libelants (*e.g.*, Tr. 122, 123, 124, 158, 178, 203, 212).

The trial court commented upon appellants' efforts to change the nature of the suit, in its oral opinion (quoted in appellants' brief, pages 16, 17).

The jurisdiction of the district court to entertain the suit of a seaman for wrongful discharge, as an admiralty matter, is clear. The fact that he may be a fisherman on a share makes no difference, for this purpose.⁶

The American Beauty, W.D. Wash., 1924, 295 Fed. 513, was a suit in admiralty by fishermen on shares, for

⁶The essential equality of seamen on wages and fishermen on shares, in admiralty, has been frequently affirmed. *Strom v. The Montague*, W.D. Wash., 1943, 53 F.Supp. 548, 1944 AMC 122 (suit for share plus maintenance and cure) is illustrative. The right of sharesmen to enforce their claims on an equal footing with crewmembers on wages has been expressly sustained. *The Grace Darling*, D.Me., 1878, 10 Fed. Cas. No. 5,651, p. 895 (suit for unpaid shares and wages).

damages due to their wrongful discharge. No one questioned jurisdiction. Judge Neterer awarded the fishermen the value of their shares to the end of the season, less their net earnings from other work. *The Page*, D. Cal., 18 Fed. Cas. No. 10,660, p. 977, is another such case, in which jurisdiction was not questioned.

Appellants rely on *Home Insurance Company v. Merchants Transportation Company*, 9th Cir., 1926, 16 F.2d 372, and *Westfall Larson & Co. v. Allman Hubble Tug Boat Co.*, 9th Cir., 1934, 73 F.2d 200, neither of which concern seamen.

In *Westfall Larson & Co.*, appellant had had to pay state court judgments for damage inflicted by its vessel on a bridge and power cable. It sought indemnity from the tug owner in an action in admiralty. This court affirmed the decree dismissing for want of jurisdiction, noting that the damage arose from what was at that time a nonmaritime tort. 73 F.2d 205.

In the *Home Insurance Company* case, appellant had paid claims under marine policies. It later sued the insured, in admiralty, to recover its payments. This court characterized the proceedings in the following language:

“[This] is an action growing out of certain alleged inequitable acts of the appellee, and primarily its purpose is to recover money obtained by means of fraud and false representations.” 16 F.2d 374.

Such a cause was held to be outside the admiralty jurisdiction.

Certainly neither of these decisions is helpful to appellants. The *Home Insurance Company* case could be

relevant only if our suit had been tried and decided on the theory that libelants were seeking recovery of the working funds they had advanced to the vessel owner. No such claims were alleged, either in the libels or in the replies. No such claims were asserted by the proctors for the libelants, upon the trial.⁷

Only Mr. Carey, then the proctor for appellants, tried to make this into an action for fraud and deceit (*e.g.*, Tr. 122, 158, 219).

The criterion of admiralty jurisdiction indicated by this Court in the *Home Insurance Company* case is as follows:

“Jurisdiction in admiralty in cases of contract depends upon the nature of the contract, ‘and is limited to contracts, claims, and services purely maritime and touching the rights and duties appertaining to commerce and navigation.’ The *Eclipse*, 135 U.S. 599, 608, 10 S.Ct. 873, 34 L.Ed. 269.” 16 F.2d, at page 373.

That the contracts of crewmembers with the owner of a fishing vessel are maritime in nature is so elemental that detailed citation of authorities would serve no purpose.

Benedict on Admiralty (6th ed., 1940) §61, commencing the discussion of maritime contracts, states generally:

“The mariners of a ship are commonly said to be wards of the admiralty. Their wages, their rights,

⁷Appellants assert in their brief, page 2, that “appellees brought the proceedings as a means to recover their original investments on the grounds that Tobin extracted monies through fraud and deceit.” There is nothing to justify such an assertion.

their wrongs and injuries have always been a special subject of the admiralty jurisdiction." Vol. 1, page 124.

A late opinion of this Court dealing with the rights of fishermen on shares, speaks of "the familiar principle that seamen are the favorites of admiralty and their economic interests entitled to the fullest possible legal protection." *Carbone v. Ursich*, 9th Cir., 1953, 209 F.2d 178, 182.

It would be astonishing if an admiralty court should refuse to help seamen simply because the shipowner had defrauded or cheated them.

A recent district court decision, in a case where the shipowner sold passenger tickets knowing that the vessel would never make the trip, is abundant proof that the admiralty court does not refuse an *admiralty remedy* simply because the defaulting party perpetrated a fraud. *Archawski v. Hanioti*, SDNY, 1955, 129 F.Supp. 410.

A very old case, which has been frequently cited in cases dealing with wrongful discharge, *Hoyt v. Wildfire*, NY, 3 Johns. 518, dealt with fraud by the shipowner, resulting in the wrongful discharge of the crew. The seamen had shipped on a voyage from New York to Bombay. The master deviated from his course under pretense of needing fresh water; and while thus sailing, the vessel was captured, and vessel and cargo were condemned.

"The act of the master, in sailing to the Isle of France, with articles contraband of war, under pretense of a want of water, was a fraudulent act, and

from the testimony in the case, there is every reason to conclude that this was the original destination of the ship, known to the owner, though concealed from the seamen. The contract entered into with the seamen was not kept with good faith. A deceit was practiced upon them. The ship and freight were justly lost by a willful violation of neutral duty, and the seamen had the soundest claim upon the owner for an equitable compensation.' ”⁸

While this was not an admiralty court decision, it is obvious from the subsequent opinion of the district court in *Williams v. The Sylph*, SDNY, 1841, 29 Fed. Cas. No. 17,740, pp. 1407, 1408, 1409, that the Federal court would have held the same.

B. The appellees have a maritime lien for their damages

Appellants take the position that fishermen on shares, who have been wrongfully discharged, have no maritime lien for their damages, under either of two conditions (see page 7, *supra*) :

(a) if the damages relate to prospective earnings after the date the vessel was attached ; or

(b) if the measure of damages is speculative.

1. Judicial attachment does not defeat a seaman's lien for damages from wrongful discharge

For the first proposition, appellants cite *Sigurjonsen v. Trans-American Traders*, 5th Cir., 1951, 188 F.2d 760, and *Vlavianos v. The Cypress*, 4th Cir., 1948, 171

⁸Quotation taken from *Van Buren v. Wilson*, 9 Cowen 158, 18 Am. Dec. 491, 494, 495.

F.2d 435, cert. den., 337 U.S. 924, 69 S.Ct. 1168, 1171, 93 L.Ed. 1732.

But in the first of these cases the court particularly found that there had been no wrongful discharge, and in the second the court did what appellants say it cannot do.

The crew libeled the ship. The Court of Appeals says:

“[The statutory penalty for wrongful discharge] should be liberally applied especially when, as in this case, the abandonment of the voyage and the discharge of the crew were occasioned by no fault on their part but by the failure of the owner to make the necessary provision for the voyage. It is true that the ship was taken into custody by reason of the libel filed by the crew, but the libel was filed after the men had been notified by the owner that the ship would not sail. It is obvious that the abandonment of the voyage was not due to the libel but to the owner’s financial difficulties which compelled him to break his contract.” *Vlavianos v. The Cyprus*, 171 F.2d 435, 439.

It is, of course, generally true that no maritime lien arises for wages (or equivalent shares) earned after judicial attachment of the vessel. But damages for wrongful discharge spring from the wrong—they are not accrued compensation.

Williston, in a section dealing with employee’s recovery where trial precedes the expiration of contract, quotes the following from a leading Massachusetts case, concluding that it represents the weight of authority in the United States:

“The plaintiff’s cause of action accrued when he was wrongfully discharged. His suit is not for

wages, but for damages for the breach of his contract by the defendant.”⁹ 5 Williston on Contracts (Rev. Ed. 1937) §1362, pp. 3821, 3822.

Admiralty courts have followed the same reasoning in allowing damages for wrongful discharge although the vessel was seized before the seaman's term had expired.

The Lakeport, WDNY, 1926, 15 F.2d 575;

The Heroe, D. Dela., 1884, 21 Fed. 525;

The Wanderer, C.C., D.La., 1880, 20 Fed. 655;

The Hudson, SDNY, 1846, 12 Fed. Cas. No. 6,831, p. 805.

Judge Parker explicitly states the matter in his dissenting opinion in *Old Point Fish Co., Inc., v. Haywood*, 4 Cir., 1940, 109 F.2d 703, 707, 708:

“There can be no question but that a sharesman under a fishing lay is entitled to the usual maritime lien for seamen's wages upon the ship, as well as upon the catch or cargo. 56 C.J. 1065 and cases cited. The seizure of the vessel resulting in a breaking up of the voyage entitled him to any amount previously earned and to damages due to the discharge. * * * No distinction can properly be drawn, with respect to the right of lien, between claim for wages earned under a contract and claim for damages arising from discharge in violation of its terms. The lien for wages covers the entire term of employment contracted for. 56 C.J. 1053; *The Wanderer*, C.C., 20 F. 655. And certainly the sea-

⁹ *Cutter v. Gillette*, 163 Mass. 95, 97, 39 N.E. 1010; numerous supporting decisions are cited, 5 Williston on Contracts (Rev. Ed. 1937), p. 3822, n. 3.

man's rights thereunder may not be defeated without fault on his part. He cannot, of course, be accorded lien for wages accruing subsequent to seizure for the reason that lien may not be created on the vessel after it has passed out of the control of the owners; but this does not mean that he may not have a lien for the damages resulting from the breach of his contract occasioned by the seizure."

There are, of course, other cases where the statutory wage penalty (46 U.S.C., §594), for discharge without fault, comes into play.¹⁰ This equivalent compensation has been allowed as a lien ranking with wages, both where the vessel has been attached by other lien creditors, *e.g.*, *The Great Canton*, EDNY, 1924, 299 Fed. 953, and where the vessel has been attached at the instance of the crewmembers themselves, *e.g.*, *Vlavianos v. The Cypress*, 4th Cir., 1948, 171 F.2d 435.

In the case now before this Court, the appellees were wrongfully discharged no later than June 7, 1954 (Finding XV, Tr. 67), and Lower's libel on June 10 did *not* break up the voyage. The liens had already arisen, not from the attachment, but from the preceding wrongful discharges.

2. Appellees were entitled to damages even though their shares were prospective

Appellant's second argument is that no lien arises because the fishing shares are speculative.

This manifestly confuses the question of lien with the question of provable damages. If the damages are there,

¹⁰This penalty is not available to fishermen on shares. *Old Point Fish Co., Inc., v. Haywood*, 4th Cir., 1940, 109 F.2d 703.

the lien follows as a matter of course. The following cited cases demonstrate this sufficiently.

The important question is whether fishermen on shares, who are wrongfully discharged before there is any catch, have any basis for proving damages.

We respectfully submit that the courts have traditionally resorted to estimates and averages to fix prospective shares as a measure of damages, and that the trial court here followed this pattern properly.

The several situations in which such prospective shares have been established are these:

(a) *Only one or two members leave the crew.*

The catch actually made by the other fishermen on the vessel is accepted as the measure.

Mason v. Evanisevich, 9th Cir., 1942, 131 F.2d 858 (fisherman injured at beginning of season);

The Betsy Ross, 9th Cir., 1944, 145 F.2d 688 (same situation);

The American Beauty, W.D. Wash., 1924, 295 Fed. 513 (fishermen wrongfully discharged during season).

(b) *The season is interrupted temporarily.*

The catch made by a similar vessel during the detention period has been accepted as a fair measure of the prospective catch.

Van Camp Sea Food Co. v. Di Leva, 9th Cir., 1948, 171 F.2d 454 (collision).

In two similar cases the courts resorted to averages.

In *The Mary Steele*, D. Mass., 1874, 16 Fed. Cas. No.

3,035, pp. 1003, 1005, Judge Lowell thought he "ought to take a rather low average" of the vessel's past trips, in estimating the lost catch.

In *The Risoluto* (1883) 5 Asp. Mar. Cas. 93, where there was a long detention, the court approved estimated damages based upon the average catches of other boats on the same fishing grounds. The claimant there made the same protest which appellants make here.

In still another similar case, *The Columbia*, EDNY, 1877, 6 Fed. Cas. No. 3,035, p. 173, Judge Benedict approved without discussion damages based upon evidence of "the probable amount of menhaden" the schooner would have caught during the detention.

Carbone v. Ursich, 9th Cir., 1953, 209 F.2d 178 (collision), had no express sum of damages to consider. The only measure mentioned is "loss of prospective catches of fish during the period." 209 F.2d 179. However, the court does refer to the cases listed above.

(c) *The voyage is abandoned prematurely.*

In *The Page*, D. Cal., 1878, 18 Fed. Cas. No. 10,660, p. 997, a case of wrongful discharge, the master breached his contract with the crew by negligently failing to provide enough salt. The court estimated the catch "to the time when it might have been reasonably and properly brought to a conclusion," based upon what the men had already caught.

Judge Benedict, in a case where master and crew were wrongfully discharged after only a few weeks of service, adopted the same measure of estimate, past catch. *Fee v. Orient Fertilizing Co.*, EDNY, 1888, 36

Fed. 509, aff'd. sub nom. *Fee v. Orient Guano Manf'g. Co.*, CC, 1890, 44 Fed. 430.

(d) *The voyage breaks up before there is any catch.*

In only one case we find, where the voyage was broken up before any shares were earned, has there been occasion to award damages. In that case this court accepted season average as the measure of probable earnings, without question.

United States v. Laflin, 9th Cir., 1928, 24 F.2d 683, concerned a trading and whaling voyage stopped, apparently before the whaling got under way, by seizure of the vessel for alleged unlawful sealing.

The proof of loss was evidence showing the amount of profits which would have been earned had the seizure not occurred, and the probable catch of whales, during the season. The average amounts of bone and oil taken from whales of the species involved, and the average market price of oil and whalebone in that season, were shown; from which sums were deducted the "usual" costs of outfitting and operating, and a sum for depreciation. 24 F.2d 684.

This measure of loss of a prospective whaling season was not questioned by appellant in that case, apparently.

In *Old Point Fish Co., Inc., v. Haywood*, 4th Cir., 1940, 109 F.2d 703, upon which appellants so strongly rely, the majority held that the arrest of the vessel at the instance of a repairman broke up the voyage without effecting a wrongful discharge, and damages were not recoverable. The court intimated that it would not

award damages anyway, since the prospective *profits* of the crewmembers were wholly speculative.¹¹

Judge Parker, of course, disagreed.

We emphasized the word profit because in the instant case, unlike *Old Point Fish Co.*, the crewmembers were to receive a share of the *gross catch* (Findings III, V, VII, IX, XI, Tr. 64, 65, 66). Profit, of course, includes a substantial element of added conjecture not present here.

For this reason, also, we omit discussion of the Washington State decisions listed on pages 24 and 25 of appellants' brief, since they deal with loss of prospective *profits* to a business.¹²

In *Williams v. The Sylph*, SDNY, 1841, 29 Fed. Cas. No. 17,740, p. 1407, upon which appellants also rely, the master committed barratry. Damages were refused the crew because the court would not penalize the ship-owner for a wrong done by the master so obviously outside his agency. Moreover, the court suspected the crew of giving the master a hand in his "malconduct." The important point in this case is that, had the owner been

¹¹The court referred to *Laflin* with approval, apparently not recognizing that its general condemnation of prospective catch as a measure of damages was in conflict with the decision in this Circuit. Unfortunately the issue was confused because the trial court had awarded damages by analogy to 46 USC, §594, and apparently there had been no cross-appeal.

¹²Three of these cases involved experimental products. The other, *Webster v. Beau*, 1914, 77 Wash. 444, 137 Pac. 1013, concerned a proposed future trading venture north of the Arctic circle, "in a remote and sparsely settled country, under dangerous and adverse conditions." 77 Wash. 449, 137 Pac. 1015.

guilty of breaking up the voyage, the court would have awarded damages.¹³

Reed v. Hussey, DCNY, 1836, 20 Fed. Cas. No. 646, the remaining case cited by appellants, is not apropos.

The general principle with which the court is here concerned is well summarized in *Gayner v. The New Orleans*, ND Cal, 1944, 54 F.Supp. 25, 28.

“That the consideration for libelants’ services might be other employment, rather than cash payments, thus resulting in uncertainty in the amount of libelants’ claim, does not, in my opinion, destroy their maritime lien. So long as the compensation may be translated into money or its equivalent, the lien is effective. Mere uncertainty or difficulty in calculation does not destroy the right. Equity will provide the means for ascertainment of amounts. The *Bouker No. 2*, 2 Cir., 241 F. 831, 834. Admiralty courts ‘act upon the enlarged and liberal jurisprudence of courts of equity; and, in short, so far as their powers extend, they act as courts of equity.’ Judge Story in *Brown v. Lull*, 4 Fed. Cas. pages 407, 409, No. 2,018.”

The rule in a civil action would be similar. 5 Williston on Contracts (Rev. Ed. 1937), §1358, Employee’s damages for wrongful discharge, pp. 3810, 3811.

The mere fact that there are probabilities to be weighed does not preclude an admiralty court from estimating damages.

The trial court took the only reasonable criterion available

In this case there were no other crewmembers to continue the season; there was no other single vessel to

¹³See reference to *Hoyt v. Wildfire*, at 29 Fed. Cas., p. 1409.

establish an analogous catch; there were no previous catches by the crew to afford a guide. There was a wrongful discharge and a clear demand for equitable compensation.

The terms of hiring were clearly made out. We knew that (had those terms been fulfilled by the vessel owner) a bait boat of given size and tonnage, with some experienced tuna fishermen aboard, would have been fishing the 1954 tuna season off the coast of Southern California, an established fishing ground. The marketing arrangements had been made with a well known fish company. Fish were actually abundant, and the annual average market price actually bettered in 1954.

Under these circumstances the court took an expert's estimate of the *minimum* average catch for vessels of like tonnage, fishing in the same waters, as established during a number of years, as the appropriate measure of damages.

We submit that this is a reasonable measure, consistent with the formula taken by this court in *United States v. Laflin, supra*, and that the trial court's judgment in the matter ought to be accepted.

CONCLUSION

We respectfully submit that the trial court rightly decided this case in favor of the crewmembers of the SILVER SPRAY, and that its decree ought to be affirmed.

M. BAYARD CRUTCHER,
BOGLE, BOGLE & GATES,
Proctors for Appellees.

No. 14645

United States Court of Appeals
For the Ninth Circuit

FRED I. PUTMAN and JAMES A. OVERMAN, *Appellants*,
vs.

HARRY C. LOWER, JOHN KADLEC, GEORGE S. HERNING,
EDGAR L. PEECHER, WILLIAM E. BARQUIST and
NORMAN L. BUNKER, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

REPLY BRIEF OF APPELLANTS

WILLIAM H. BOTZER
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Proctors for Appellants.

1415 Joseph Vance Building,
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THE ARGUS PRESS, SEATTLE

FILED

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BUNKER,
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No. 14645

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

REPLY BRIEF OF APPELLANTS

Appellants have no further comments to make with respect to Kadlec; therefore our remarks are directed to the remaining appellees.

Each authority in appellees' brief has been examined with utmost care as related to the transcript, the exhibits, and the arguments and authorities in the opening brief of appellants.

JURISDICTION

Each of the appellees testified that he thought he had been defrauded. The appellants had no reason to initiate this issue for it was agreed that the mortgage was valid. The issue of deceit arose from the appellees' replies (Tr. 52, 54, 57, 59) wherein they claimed the share

contracts had been exacted through Tobin's misrepresentations. The Silver Spray was impounded *in rem* in admiralty without prepayment of costs on Lower's assertion that the suit was for wages. At the trial he and the other appellees testified no wages were due; they had so declared in their replies. Thus at the outset we find the *in rem* jurisdiction tampered with without just cause.

The final and conclusive lack of jurisdiction is shown by the testimony of all appellees that they were defrauded and sued to get their money back.

The only answer of appellees (Appellees' Brief, 20 and footnote) is the assertion that their *proctors* did not claim the suits were in fact for fraud and deceit. In effect they argue that appellees' own conception of the nature of the litigation must be ignored. Counsel declares he can find nothing in the record, though we have referred to and analyzed the testimony (Tr. 122, 123, 158, 178, 203, 212). In addition to the foregoing references Lower testified (Tr. 120):

"Q. You wanted your \$2500.00 back? Correct?

A. Yes.

Q. And isn't that the reason you saw counsel about bringing this suit? A. Yes.

MR. COLLINS: That is all."

Appellees refused to perform the share contracts and disavowed them on the grounds of fraud and false representations. Upon disavowal the remedy was against Tobin for fraud at common law. These remedies are still available.

DAMAGES

Mr. Hervey Petrich testified that he had no knowledge of the earning capacity of a jig or troller like the Silver Spray and his testimony only referred to large tuna clippers. On being handed a photograph by the trial judge he immediately exclaimed (Tr. 188):

“Witness: This vessel is no bait boat. This is a jig boat or trolling boat. Well, we are or have been talking about bait boats.

Q. (By MR. CAREY): What you have been testifying about throughout were the regular tuna schooners built for the tuna service and you haven’t been talking about jig fishing at all?

A. No.”

Mr. Petrich repeats (Tr. 189) that all his evidence related to the capacity of a bait boat and had no relation to a jig boat as shown in the photograph.

Appellees introduced no evidence on a prospective catch of a small capacity three-man troller. Argumentation cannot be substituted for evidence. Nevertheless on page eleven of brief of appellees we find this statement: “Following is a summary of evidence as to the prospective tuna catch of the Silver Spray, had her owner carried out his agreement with the crew.”

This phase of appellees’ argument is built upon one speculation after another: if the District Court had admiralty jurisdiction; if the Silver Spray had an established tonnage; if counsel’s computations were correct, there being none by the District Court; if the vessel were built like a large tuna clipper; if Tobin had a contract with Van Camp; if Tobin, rather than Lower,

Peecher and Barquist had terminated the voyage before it began; if there had been no attachment; if appellees had substantial past tuna experience to match that of Mr. Petrich; and if speculative damages could be reasonably ascertained, then and only upon *proof of all* such eventualities, the appellees might have claims for damages for loss of the catch. But even so. their claims cannot be lienable *in rem*, but only as claims *in personam*.

APPELLEES' CLAIMS ARE NOT LIENS

Quare: *Is there a lien against a vessel for fish that have not been caught, particularly after formal seizure?*

The fishing industry is vitally concerned with the answer to this question.

On page twenty-two of brief of appellees, we note this heading: "Judicial attachment does not defeat a seaman's lien for damages from wrongful discharge." They cite no authority to sustain such a lien for speculative shares after seizure. The appellees go to great lengths to analyze the various methods of computing damages. We can only reply to the authorities offered and realize the majority of cases they cite are to support their several theories on damages and none are quoted to sustain the proposition that fishermen have liens against a vessel for speculative shares where the season had not commenced, and particularly for shares that might have been earned after seizure.

Appellees' decisions fall into five categories:

1. Seamen have a lien for wages or shares that *had been earned* but not paid:

The Hudson (SDNY) 1846, 12 Fed. Cas. No. 6,831;

The Grace Darling (D. Me.) 1878, 10 Fed. Cas. No. 5,651;

The Great Canton (EDNY) 1924, 299 Fed. 953.

2. Upon wrongful discharge, the crew may recover *in personam*:

Fee v. Orient Fertilizing Co. (EDNY) 1888, 36 Fed. 509;

The Page (D. Cal.) 1878, 18 Fed. Cas. No. 10,660.

In the second case, the court observes that inefficient and inexperienced fishermen are not permitted to base any kind of a claim on a full cargo of fish.

United States v. Laflin (9th Cir., 1928) 24 F.2d 683, involves nothing more than a suit against the government for damages for breaking up a whaling voyage.

3. Where the seine is damaged in collision cases involving maritime *torts*, the crew may have a lien against the offending vessel during the time necessary to repair or replace the seine:

The Columbia (EDNY) 1877, 6 Fed. Cas. No. 3,035;

The Mary Steele (D. Mass.) 1874, 16 Fed. Cas. No. 9,226;

Carbone v. Ursich (9th Cir. 1953) 209 F.2d 178;

Van Camp Sea Food Co. v. DiLeva, 9th Cir., 1948, 171 F.2d 454.

It is interesting to observe that in these cases the *tort* liability was not denied, though the measure of

damages was questioned. The real issue in these cases is whether it is for the crew or the owner to institute the proceedings.

4. Specific wage contracts are being enforced:

The Lakeport (WDNY) 1926, 15 F.(2d) 575;

The Heroe (D. Dela.) 1884, 21 Fed. 525;

The Wanderer (C.C., D. La., 1880) 20 Fed. 655.

In principle, appellees' case of *Gaynor v. The New Orleans* (N.D. Cal., 1944) 54 F.Supp. 25, 18 is the same. The libel was based on a written agreement between seamen and San Francisco Bay ferryboat owners that the opening of the new bridges would terminate ferry service and upon those events the seamen would receive dismissal benefits. Thus when the ferries stopped the benefits were earned and became payable.

Archawski v. Hanioti (SDNY, 1955) 129 F.Supp. 410, only holds that the owner may be held personally liable in admiralty for the enforcement of contracts of affreightment.

5. Fishermen who were wrongfully discharged or severed from the vessel through injuries, may lien the vessel for shares providing the vessel continues with the voyage, catches fish, and the shares have been, or may be, computed:

Mason v. Evanisevich (9th Cir., 1942) 131 F. (2d) 858;

The American Beauty (W.D. Wash., 1924) 295 Fed. 513;

The Montague (W.D. Wash., 1943) 53 F.Supp. 548.

CONCLUSION

As noted in our opening brief, appellants' authorities cannot be answered. In effect the District Court concluded that *Old Point Fish Co., Inc. v. Haywood* (4 Cir. 1940) 109 F.(2d) 703, governed the case. The entire field of admiralty law cannot be overcome by Judge Parker's dissenting opinion. But the appellees have nothing else to rely on. Actually the dissent is not applicable for Judge Parker was not confronted with the innocent holders of a valid first preferred marine mortgage. Rather, he was simply weighing the equities between the repairmen and the seamen as disclosed at the end of his opinion on page 708, where he says that the repairmen should be charged with direct knowledge of the seamen's plight.

The appellees find themselves in an unfortunate situation but they are not without their remedies: they may press Tobin for their investments, which obviously they thought they were doing when the respective libels were filed.

Respectfully submitted,

WILLIAM H. BOTZER,

PEYSER, CARTANO, BOTZER & CHAPMAN,

Proctors for Appellants.

No. 14674

**United States
Court of Appeals**
for the Ninth Circuit

HOMER E. GILLESPIE, CATHERINE L.
GILLESPIE and GILLESPIE GAMES
COMPANY, a Corporation,

Appellants,

vs.

COMA F. NORRIS, Individually and Doing Busi-
ness as C. F. NORRIS MANUFACTURING
COMPANY,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 80)

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**

FILED
JUN 20 1955



No. 14674

**United States
Court of Appeals**
for the Ninth Circuit

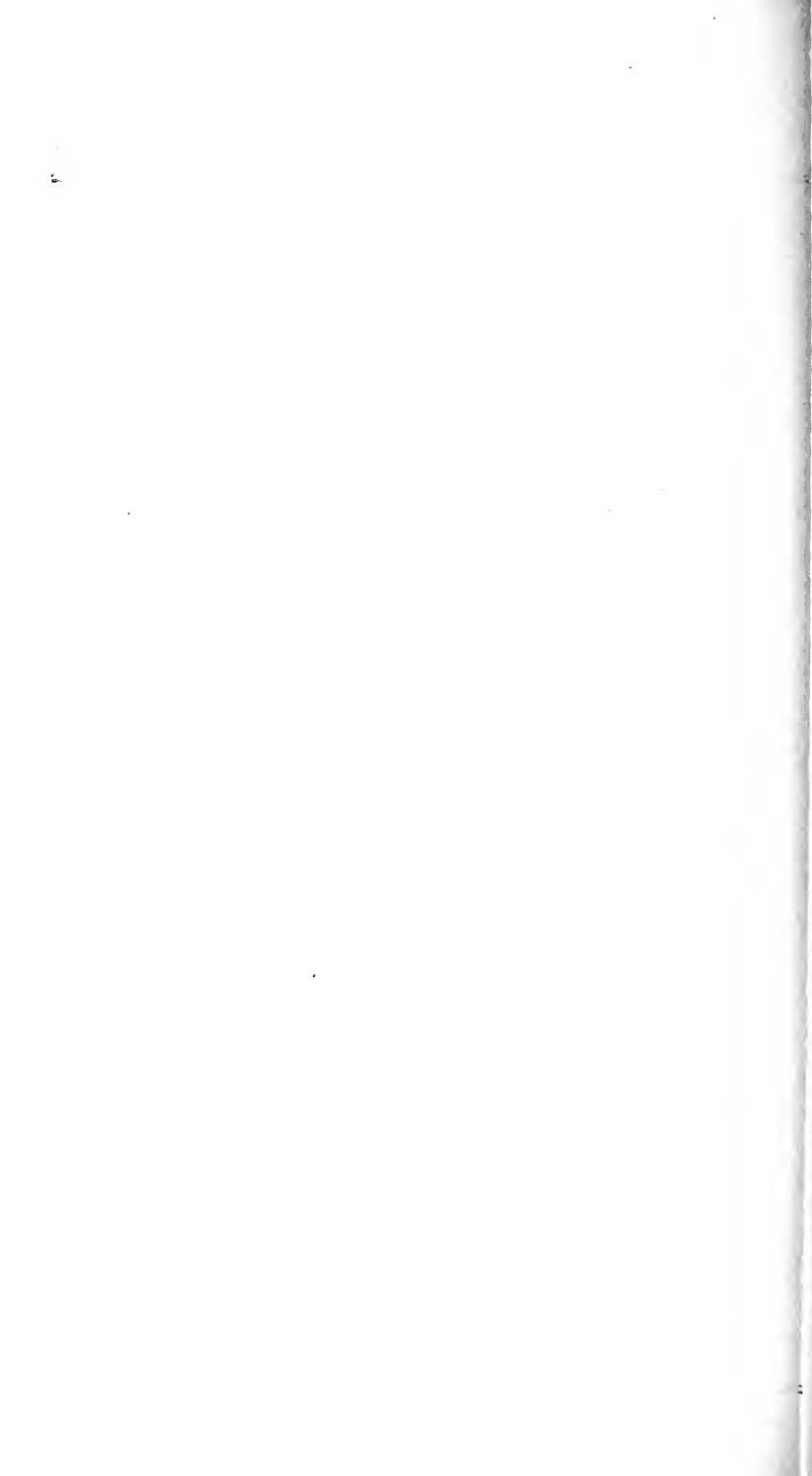
HOMER E. GILLESPIE, CATHERINE L.
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COMA F. NORRIS, Individually and Doing Busi-
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, Southern
District of California, Central Division

Civil Action No. 16,858-W.M.

HOMER E. GILLESPIE, CATHERINE L. GIL-
LESPIE, GILLESPIE GAMES COMPANY,
a California Corporation,

Plaintiffs,

vs.

COMO F. NORRIS, Individually and Doing Busi-
ness as C. F. NORRIS MANUFACTURING
COMPANY; DOE ONE, DOE TWO, DOE
THREE, DOE FOUR and DOE FIVE,

Defendants.

COMPLAINT FOR INFRINGEMENT OF
U. S. LETTERS PATENT #2,595,669

Plaintiffs complain of Defendants and for cause
of action allege:

I.

That at all times herein mentioned Plaintiffs and
Defendants were and now are residents of the City
of Long Beach, County of Los Angeles, State of
California.

II.

This action arises under, and the jurisdiction of
the Court is based upon, the Patent Laws of the
United States of America and on the further
ground that the acts of infringement hereinafter
complained of were and are being committed in

the [2*] City of Long Beach, County of Los Angeles, State of California, within this District and elsewhere within the United States.

III.

Plaintiffs are ignorant of the true names of Does One, Two, Three, Four and Five, and whether they be corporations, associations or natural persons, and for that reason said Defendants and each of them are sued by said names as fictitious names and when Plaintiffs ascertain the true names of the Defendants then will ask leave of Court to amend this Complaint and all subsequent proceedings herein to show the true names of the Defendants and their capacities.

IV.

That at all times herein mentioned Gillespie Games Company was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California and is authorized to do, and is now engaged in doing business in the State of California, with principal place of business located in the City of Long Beach, County of Los Angeles, State of California.

V.

That at all times herein mentioned Defendant Como F. Norris was and now is doing business under the fictitious firm name and style of Como Norris Manufacturing Company, and has filed a certificate and published a notice as required by

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Section 2466 and Section 2468 of the Civil Code of the State of California.

VI.

That on the 11th day of October, 1948, Plaintiff, Homer E. Gillespie, being within the meaning of the statutes of the United States then in force, the original and first inventor of a certain "Disk Game Apparatus" and being entitled to a patent thereon, under the provisions of the said statutes duly filed in the United States Patent Office an application for Letters Patent, [3] being Serial No. 53776, for said invention; that thereafter the said Homer E. Gillespie assigned his entire right, title and interest in and to said application for U. S. Letters Patent to Gillespie Games Company, a California corporation, and after compliance with all of the requirements of the then existing statutes of the United States and Rules of Practice of the United States Patent Office, Letters Patent of the United States, No. 2,595,669 was duly granted to the said Plaintiff and to Gillespie Games Company, a California corporation, as assignee on said application, Serial No. 53776. That thereafter on the 23rd day of June, 1953, Gillespie Games Company, a California corporation, assigned an undivided one-half interest in and to said invention and to said Letters Patent to Plaintiff, Catherine L. Gillespie, and further assigned an undivided one-half interest in and to said invention and said Letters Patent to Plaintiff, Homer E. Gillespie, and that said U. S. Letters Patent No. 2,595,669 has always been since said

23rd day of June, 1953, and is now vested in said Plaintiff, Homer E. Gillespie, and Plaintiff Catherine L. Gillespie.

VII.

That Plaintiff is informed and believes and on that ground alleges that said invention and improvement has been and now is of great benefit and advantage to the public and the rights of Plaintiff under said Letters Patent have been generally accepted and acquiesced in.

VIII.

That Defendants, and each of them, have within the last six years and prior to the filing of this complaint and subsequent to said date of issue of said Letters Patent, to wit: the 6th day of May, 1952, infringed the said Letters Patent and continue to so infringe by making or causing to be made, selling or causing to be sold and using or causing to be used, within this District and [4] elsewhere within the United States Disk Game Apparatus made in accordance and embodying the invention as disclosed and claimed in said Letters Patent, wilfully and without the consent of the Plaintiffs.

IX.

That Plaintiffs have notified Defendants in writing, on the 22nd day of September, 1948, of their said acts of infringement and requested them to desist, but nevertheless Defendants have refused and neglected to desist and have disregarded such notice and such request and continue to infringe

under said U. S. Letters Patent No. 2,595,669, and threaten to continue to so infringe.

X.

That Defendants have derived unlawful gains and profits from such infringement which Plaintiffs would otherwise have received but for such infringement and Plaintiffs have thereby been caused irreparable damages.

XI.

That Plaintiffs have regularly and continuously marked all their patented apparatus sold or used by them with the notice of Letters Patent owned by them or application pending in the U. S. Patent Office, in full compliance with the United States statutes relating to marking of patented articles for which U. S. Letters Patent have been applied for. Wherefore, Plaintiff prays:

1. For an injunction restraining Defendants and each of them, their officers, agents, servants and employees from directly or indirectly making or causing to be made, selling or causing to be sold, or using or causing to be used, any Disk Game Apparatus or skill game apparatus made in accordance with or embodying the [5] inventions of U. S. Letters Patent No. 2,595,669 or from infringement upon or violating the said Letters Patent in any way whatsoever;

2. For an accounting of profits from the 22nd day of September, 1948, to date and damages; that said profits and damages to be paid by Defendants and each of them be trebled in view of the wilful and deliberate nature of the infringement;

3. That each and all of the infringing devices which are in the possession of, or under the control of the Defendants, and each of them be delivered into Court for such final disposition as to the Court may seem just and proper;

4. For reasonable attorneys' fees; for costs of suit incurred herein, and for such other and further relief as to the Court may seem meet and just.

ERIC A. ROSE and
ALBERT D. WHITE,
Attorneys for Plaintiffs;

By /s/ ERIC A. ROSE.

Duly verified.

[Endorsed]: Filed June 19, 1954. [6]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Como F. Norris, individually and doing business as C. F. Norris Manufacturing Company, and for answer to plaintiffs' complaint herein, admits, denies and alleges as follows:

I.

Answering paragraph II of said complaint, defendant admits the jurisdiction of the Court, but defendant denies that he is now committing or has ever in the past committed any act of patent infringement as alleged in said complaint in this dis-

strict or elsewhere giving plaintiffs any cause of action under the Patent Laws of the United States of America.

II.

Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the [8] allegations contained in paragraph IV of the complaint.

III.

Defendant admits the allegations contained in paragraph V of the complaint.

IV.

Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VI of the complaint except that defendant denies that said patent was duly or legally issued.

V.

Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VII of the complaint.

VI.

Defendant denies generally and specifically each and every allegation of paragraph VIII of the complaint.

VII.

Defendant denies each and every allegation contained in paragraph IX of the complaint except that defendant admits that he has received written notice of infringement.

VIII.

Defendant denies generally and specifically the allegations contained in paragraph X of the complaint.

IX.

Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XI of the complaint.

As Further, Separate and Affirmative Defenses, Defendant Alleges:

X.

That United States Letters Patent No. 2,595,669 and every claim thereof is invalid because: [9]

A. The subject matter claims therein and all material and substantial parts thereof had, long prior to the alleged invention by plaintiff, Homer E. Gillespie, or more than one year to application therefor, been described in United States Letters Patent, Foreign Letters Patent, and printed publications including the following:

Patentee	Patent No.	Date
Forrest	890,897	6/16/08
Fulton, et al.....	1,008,898	11/14/11
Verral	1,190,488	7/11/16
Williams	1,706,271	3/19/29
Williams	1,806,274	5/19/31
Rather	1,866,821	7/12/32
Weber	2,248,316	7/ 8/41

B. The subject matter claimed in said patent, and all material and substantial parts thereof, had, long prior to the alleged invention thereof by the applicant for said patent, been known and used in the United States by many others, including the applicants and assignees of the patents listed in Paragraph A above, at the addresses set forth in said patents, and by the authors and publishers of and the persons mentioned in the publications listed in said Paragraph A at the addresses set forth in said publications.

C. The subject matter claimed in said patent and all material and substantial parts thereof, had, long prior to the alleged invention thereof by the applicant for said patent or more than one year prior to his application therefor, been in public use or on sale in the United States by said applicant and his assignees, by the applicants and assignees of the patents listed in Paragraph A above at the addresses set forth in said patents, by the authors and publishers of and the persons mentioned in the publications, and by many other persons whose names and addresses are at present unknown to defendant. [10]

D. Each and every element and feature disclosed and claimed in said patent as well as the use, function and effect thereof, both singly and in divers associations and combinations, was well known in the art long prior to the alleged invention thereof by the applicant for said patent, and the conception and production of the alleged invention

claimed in said patent was nothing more than the exercise of the ordinary and expected skill of persons familiar with the art to which said patent relates.

E. The alleged invention claimed in said patent is not a patentable combination, but is a mere aggregation of elements and parts which do not cooperate in any new or unexpected way or produce any new or unexpected result, or any old result in a new or more facile manner.

F. Said claims do not comply with the provisions of R. S. 4888 (35 U.S.C.A. 33) in that:

(1) Neither the alleged invention claimed in said patent nor the manner or process of making, constructing or using the same are described in said patent in such full, clear, concise or exact terms as to enable a person skilled in the art or science to which said alleged invention appertains or with which it is most closely connected, to make, construct, or use the same, nor is the principle thereof explained so as to distinguish it from other inventions.

(2) None of the claims particularly point out or distinctly claim the part, improvement or combination which the applicant for said patent claimed as his invention or discovery.

G. The applicant for said patent abandoned the alleged invention disclosed and claimed in said patent.

H. The invention claimed in said patent is sub-

stantially different from any indicated, suggested, described or claimed [11] in the original application therefor.

I. The subject matter thereof was not the sole invention of the applicant for said patent, but was the joint invention of said applicant and another, which fact was well known to said applicant at the time he filed said application.

J. Said claims were so limited by requirements of the Commissioner of Patents during the prosecution of said patent as not to be susceptible of a construction which will include any device or apparatus which has been or is now being made, used or sold by defendant.

K. That prior to the issuance of said patent, the apparatus claimed therein had been disclosed and claimed in a prior United States Letters Patent by plaintiff, Homer E. Gillespie, the number of which is unknown at present to defendant.

XI.

That plaintiffs come into Court with unclean hands and are precluded from any equitable relief whatsoever.

By Way of Counter-Claim Against Plaintiffs, the Defendant Alleges:

XII.

That said patent No. 2,595,669 and each and every claim thereof is invalid for the reasons heretofore set forth in paragraph X of this Answer, and de-

fendant repleads and incorporates said paragraph herein by reference to the same as though herein set forth in full.

XIII.

That no device or structure made, used or sold by the defendant prior to the filing of the complaint herein infringes any claim of said patent.

XIV.

That plaintiffs have notified defendant and have alleged in their complaint herein that said patent is valid and infringed [12] by defendant, and, therefore, there is a controversy existing between plaintiffs and defendant in this action, which, under 28 U.S.C. 2201, is cognizable by this Court and should be litigated as a counter-claim in this action.

XV.

That plaintiffs have conspired and entered into agreements with persons at present unknown to defendant to use the patent in suit to unlawfully restrain trade and competition, all in contravention of the law and against public policy. That said acts of plaintiffs constitute misuse of said patent, unfair trade practices, and unfair competition against defendant to his irreparable damage.

Wherefore, defendant prays:

1. That Patent No. 2,595,669 and each and every claim thereof be adjudged invalid;
2. That the defendant be adjudged not to have infringed said Letters Patent or any claim thereof;
3. That plaintiffs be adjudged not entitled to any relief against the defendant and be prohibited

from enforcing said patent against the defendant because of plaintiffs' use of said patent contrary to law and public policy, and because plaintiffs come into Court with unclean hands;

4. That the complaint on file herein be dismissed with costs of suit to defendant, including his attorneys' fees incurred herein;

5. That defendant be awarded three-fold damages by him sustained;

6. For such other and further relief as this Court shall deem just and proper.

Dated at Long Beach, California, this 28th day of July, 1954.

/s/ WILLIAM C. BABCOCK,
Attorney for Defendant Como
F. Norris.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 29, 1954. [13]

[Title of District Court and Cause.]

DEFENDANTS' INTERROGATORIES
TO PLAINTIFF

To Eric A. Rose and Albert D. White, Attorneys
for Plaintiff, 711 F & M Building, Long Beach
12, California:

The defendant requests that the plaintiff, Homer E. Gillespie, answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1. Please list each of the claims in United States Letters Patent No. 2,595,669 that plaintiffs allege defendant has infringed by:

(a) Manufacturing devices embodying the alleged invention claimed in said patent.

(b) Selling devices embodying the alleged invention claimed in said patent.

(c) Using devices embodying the alleged invention claimed in said patent. [19]

2. If the answers to Interrogatories 1(a), 1(b) or 1(c) Claim 1, will you urge at the trial that the claim should be construed sufficiently broad that the element, "a horizontal playing field having targets," specified therein, includes a playing field having a shape other than the circular shape shown in Figures 1 and 3 of the patent in suit?

3. If the answers to Interrogatories 1(a), 1(b) or 1(c) is Claim 1, will you urge at the trial that the element, "and means for displacing the playing pieces from the playing field at the conclusion of a game," specified therein, includes other than a horizontally disposed sweep means extending completely over the playing field and operatively attached to a vertical shaft.

4. If the answers to Interrogatories 1(a), 1(b) or 1(c) is Claim 2, will you urge at the trial that the claim should be construed sufficiently broad that the element, "a horizontal playing field having targets," specified therein, includes a playing

field having a shape other than the circular shape shown in Figures 1 and 3 of the patent in suit.

5. If the answers to Interrogatories 1(a), 1(b) or 1(c) is Claim 2, will you urge at the trial that the element, "and means for displacing the playing pieces from the playing field at the conclusion of a game," specified therein, includes other than a horizontally disposed sweep means extending completely over the playing field and operatively attached to a vertical shaft?

6. If the answers to Interrogatories 1(a), 1(b) or 1(c) is Claims 11, 12, 13 or 14, will you urge at the trial that the element, "a playing field including targets," specified therein, includes a playing field having a shape other than the circular shape shown in Figures 1 and 3 of the patent?

7. If the answers to Interrogatories 1(a), 1(b) or 1(c) is Claim 1, will you urge at the trial that the claim should be construed sufficiently broad that the elements, "a horizontal [20] playing field having targets," and "means for displacing the playing pieces from the playing field at the conclusion of a game," specified therein, would include:

(a) A horizontal rectangular playing field having targets thereon.

(b) A transversely disposed bar that may be moved longitudinally over said rectangular field to remove disc-like playing pieces therefrom.

8. If the answers to Interrogatories 1(a), 1(b) or 1(c) is Claim 2, will you urge at the trial that the claim should be construed sufficiently broad that the elements, "a horizontal playing field having targets," and "horizontally disposed sweep means extending completely over the horizontal playing field for removing the playing pieces from the playing field at the conclusion of a game," specified therein would include:

(a) A horizontal rectangular playing field having targets thereon.

(b) A transversely disposed bar that may be moved longitudinally over said rectangular field to remove disc-like playing pieces therefrom.

9. If the answers to Interrogatories 1(a), 1(b) or 1(c) is Claim 1, will you urge at the trial that the claims should be construed sufficiently broad that the element, "and means for displacing the playing pieces from the playing field specified therein," would include:

(a) A transversely disposed bar that is moved manually over a horizontal playing field to remove the playing pieces therefrom.

(b) A rectangular playing field, formed of two smaller rectangular segments, with the segments pivotally supported whereby they may pivot downwardly and away from one another to cause playing pieces [21] disposed thereon to drop downwardly there between, and

said segments being moved downwardly and away from one another and returned to said horizontal position by manual effort only.

10. At what dates did Homer E. Gillespie:

- (a) Conceive.
- (b) Make the first drawing.
- (c) Make the first model of said alleged invention.
- (d) Have the first model of said alleged invention made.

as defined in Claims 1, 2, 3, 11, 12, 13, 14 of said patent.

11. Did Homer E. Gillespie have anyone assist him in:

(a) Conceiving the structural details of each element in the combination of elements that form said alleged invention.

(b) Conceiving the structural detail of any element in the combination of elements that form said alleged invention.

(c) Making the first drawing of the elements which in combination form said alleged invention.

(d) Making the first drawing of each element in said combination that form said alleged invention.

(e) Make the first model in which the elements were combined to form said alleged invention.

(f) Make each of the elements that could be combined to form said alleged invention.

as defined in Claims 1, 2, 3, 11, 12, 13 and 14 of said patent.

12. If the answer to any one of the Interrogatories 11(a), (b), (c), (d), (e), (f) is "yes," please state the name or names of such person or persons, and their present address.

13. Did Homer E. Gillespie prior to October 11, 1948, [22] have anyone:

(a) Explain the manner in which.

(b) Make drawing of the manner in which.

(c) Make parts that could be assembled to provide.

(d) Assemble parts to provide the.

combination of elements specified in Claims 1, 2, 3, 11, 12, 13 and 14 to provide said alleged invention defined therein.

14. If the answer to Interrogatories 13(a), (b), (c), or (d) is "yes," please state the name of said person or persons and their present addresses.

15. Did Homer E. Gillespie ever:

(a) Use.

(b) Publicly use.

(c) Permit other persons to use.

(d) Permit other persons to use publicly.

(e) Manufacture.

(f) Permit other persons to manufacture.

(g) Sell.

(h) Permit other persons to sell.

said alleged invention as defined in Claims 1, 2, 3, 11, 12, 13 or 14 of said patent prior to October 11, 1948.

16. If the answer to Interrogatories 15(a), (b), (c), (d), (e), (f), (g) or (h) is "Yes," please state the names and addresses of such person or persons.

17. Will Plaintiffs at the trial urge that:

- (a) Claim 1.
- (b) Claim 2.
- (c) Claim 3.
- (d) Claim 11.
- (e) Claim 12.
- (f) Claim 13.
- (g) Claim 14. [23]

are sufficiently broad to cover games having "playing fields" of any shape?

18. Will Plaintiffs at the trial urge that the patent in suit:

- (a) Illustrates.
- (b) Describes.
- (c) Claims.

a sweep means other than a vertical rotatable shaft from which a substantially horizontal arm projects that may support various forms of playing surface engaging members that are adapted to sweep playing pieces from said surface.

19. Will Plaintiffs at the trial urge that the sweep means:

- (a) Illustrated.
- (b) Described.
- (c) Claimed.

in the patent in suit is able to remove all playing pieces from a playing surface by said sweep means sweeping over the entire area of said surface, when said surface is of a shape other than circular?

20. Will Plaintiffs at the trial urge that the alleged invention in:

- (a) Claim 1.
- (b) Claim 2.
- (c) Claim 3.
- (d) Claim 11.
- (e) Claim 12.
- (f) Claim 13.
- (g) Claim 14.

is defined by a combination of elements, in which one of said elements is a playing surface of non-circular shape?

21. Did Gillespie Games Company, a [24] corporation, through its attorney, Mr. Eric Rose, in an amendment, dated August 20, 1951, to obtain an allowance of claims in the patent in suit make the statement:

“Weber’s invention will not accomplish that purpose, and if Weber’s idea be used on Forrest’s device, the purpose of completely covering the playing field could not be accomplished, because the particular construction claimed by applicant is suit-

able on a circular field only which does not extend beyond a circular area''?

22. Will Plaintiffs at the trial contend that the representation made to the Patent Office in said amendment, dated August 20, 1951, by Mr. Eric Rose and quoted in Interrogatory No. 21 was subsequently:

(a) Withdrawn.

(b) Denied.

in the prosecution of the patent application, Serial No. 53,776, that matured into the patent in suit?

23. Do Plaintiffs at the present time have:

(a) Personal knowledge.

(b) Witness who would testify under oath.

(c) Affidavit.

(d) Written evidence.

(e) Pictorial evidence.

(f) Evidence of any kind.

of a single use, sale, or manufacture of a device by the Defendant since May 6, 1952, by which Claims 1, 2, 3, 11, 12, 13, 14 would be infringed, if the playing field specified in said claims is limited to a field of circular shape.

24. Did Homer E. Gillespie know on October 11, 1948, when he filed for the patent in suit that a penny pitch embodying all of the structural features shown on the attached photographs, which have been designated Exhibits "A," "B," and "C," was built

and [25] publicly used by Defendant during the year 1946. Said structural features are identified, for clarity, on said exhibits by letters, which letters identifying said features are as follows:

- A. Rectangular playing field.
- B. Targets marked on said field.
- C. Walls extending upwardly from edges of said field.
- D. Horizontal launching platforms extending outwardly from the upper edges of said walls.
- E. Horizontal transparent glass cover that extends over inner edge portions of said platforms.
- F. Spacers that maintain said cover a slight distance above said inner platform edge portions.
- G. Slits defined by said cover and inner platform edge portions through which flat playing piece may be trajected onto said playing field in an endeavor to locate said piece on one of said targets.
- H. Transversely disposed bar that may be moved longitudinally over the entire area of said playing surface to remove playing pieces therefrom, (in red).
- I. Lever to manually move said bar over area of playing field to remove playing pieces therefrom.

25. Said Patent No. 2,595,667 refers to a co-pending application Serial No. 756,523 for a skill game. State the date of said application.

26. Has application Serial No. 756,523 for a skill game resulted in the issuance of a patent, and if so what is the date of said patent, its title, and the serial number of said patent?

27. If the answer to Interrogatory 26 is "no," has the application been abandoned?

28. If the answer to Interrogatory 27 is "yes," what is the date of said abandonment? [26]

29. Referring to Paragraph 11 of the complaint, on what date did Plaintiffs or any of them commence placing the required statutory notice on articles sold by them or any of them embodying the alleged invention Letters Patent 2,595,669?

Please take notice that a copy of such answers must be served upon the undersigned within fifteen (15) days after the service of these interrogatories.

Dated: September ..., 1954.

/s/ WILLIAM C. BABCOCK,

Attorney for Defendant, Coma
F. Norris.

[Exhibits A, B, and C. See pages 99, 100, 101, of the Book of Exhibits.]

[Endorsed]: Filed September 4, 1954. [27]

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF FACTS

To Eric A. Rose and Albert D. White, Attorneys for
Plaintiff, 711 F & M Building, Long Beach 12,
California:

Please Take Notice that the Defendants hereby request the Plaintiff Homer E. Gillespie, pursuant to Rule 36 of the Federal Rules of Civil Procedure, to admit within ten (10) days after service of this request, for the purposes of the above-entitled action only, and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts:

1. That the drawings in the patent in suit show only a circular playing field.

2. That the drawings in the patent in suit show only a vertical rotatable shaft, a substantially horizontal arm extending outwardly from said shaft, and said arm supporting various [32] members that slidably engage the playing surface with a sliding motion to displace playing pieces therefrom, as the "means for displacing the playing pieces" and "sweep means" specified in Claim 1 and Claims 2 and 3 thereof.

3. That a vertical rotatable shaft, a substantially horizontal arm extending outwardly from said shaft, and said arm supporting various members that may slidably engage a playing surface, would only be operative to slidably contact the entire area of a

playing surface to remove playing pieces therefrom when said playing field is of a circular shape.

4. That the shape of the playing field is not defined in Claims 1, 2, 3, 11, 12, 13, 14.

5. That the Gillespie Games Company, a corporation, through its attorney, Eric A. Rose, in an amendment dated August 20, 1951, to obtain an allowance of claims in the patent in suit made the statement:

“Weber’s invention will not accomplish that purpose, and if Weber’s idea be used on Forrest’s device, the purpose of completely covering the playing field could not be accomplished, because the particular construction claimed by applicant is suitable on a circular field only which does not extend beyond a circular area.”

6. That the Plaintiffs obtained title to the patent in suit from Gillespie Games Company.

7. That the Plaintiffs as assignees of the patent in suit are bound by all commitments and limitations made by Mr. Eric A. Rose in obtaining the claims allowed on the alleged invention.

8. That Claims 1, 2, 3, 11, 12, 13 and 14 as a result of said representation made by Mr. Eric A. Rose are limited to an interpretation in which the playing field element in the combination of elements in each claim that defines the alleged invention is [33] of a circular shape.

9. That any novelty to the broad combination of a:

(a) Rectangular horizontal playing surface with targets thereon.

(b) Four walls extending upwardly therefrom to protect the surface.

(c) Means to remove playing pieces from the playing surface.

(d) Slits through which playing pieces may be discharged onto said playing surface.

is disclosed in the W. E. Andrews patent entitled Game Device No. 2,160,349 that issued May 30, 1939, a copy of which is attached hereto.

10. That the disclosures in said Andrews patent were not considered by the Patent Office during the prosecution of the patent in suit.

11. That said Andrews patent issued more than one year prior to the date Homer E. Gillespie filed his application for the patent in suit.

12. That any novelty to the broad combination of a:

(a) Horizontal playing field.

(b) Protective walls around said playing surface.

(c) Launching platform for flat playing pieces disposed above said playing field and outwardly therefrom.

is disclosed in the C. T. Dorsey patent No. 725,684

that issued April 21, 1903, a copy of which is attached hereto.

13. That said Dorsey patent issued more than one year prior to the date Homer E. Gillespie filed his application for the patent in suit.

14. That the disclosures in said Dorsey patent were not considered in the prosecution of the patent in suit.

15. That Defendant had for more than one year prior to [34] the date Homer E. Gillespie applied for the patent in suit publicly used a penny pitch that included:

(a) A horizontal rectangular playing field on which targets were marked.

(b) Walls extending upwardly from said field to prevent access thereto.

(c) Horizontal platforms extending outwardly from the upper edges of said walls.

(d) A rectangular transparent sheet that extends over the inner edge portions of said platforms.

(e) Spacers that hold said sheet above said platforms to cause said sheet to define slits therewith through which flat playing pieces may be trajected onto the playing field.

(f) A transversely disposed bar that may be moved over the entire surface of said playing field to remove playing pieces therefrom.

16. That the novelty in Claims 1, 2, and 3 of the patent in suit is the combination of a circular playing field with targets, rotatable sweep means that slidably contact the entire area of said field to remove playing pieces therefrom with each rotation thereof, and the old element of an elevated playing piece launching platform and cover glass to define a slit through which playing pieces may be trajected onto said playing surface.

17. That Plaintiffs at the present time have no:

- (a) Personal knowledge.
- (b) Witnesses who would testify under oath.
- (c) Affidavit.
- (d) Written evidence.
- (e) Pictorial evidence.
- (f) Evidence of any kind.

of a single use, sale or manufacture of a device by the Defendant [35] since May 6, 1952 by which Claims 1, 2 and 3 when limited to a circular playing field and rotatable playing piece displacing means would be infringed.

18. That Plaintiffs at the present time have no:

- (a) Personal knowledge.
- (b) Witnesses who would testify under oath.
- (c) Affidavit.
- (d) Written evidence.
- (e) Pictorial evidence.
- (f) Evidence of any kind.

of a single use, sale or manufacture of a device by the Defendant since May 6, 1952, by which Claims 1, 2 and 3 when limited to a circular playing field would be infringed.

19. That the plaintiff, Homer E. Gillespie, in his application for Patent No. 2,595,669 in his First Amendment to said application, said amendment dated June 13, 1949, made the following statement, "Applicant is not claiming broadly the combination of a missile launching means, the playing surface and a sweep."

Dated: September . . , 1954.

/s/ WILLIAM C. BABCOCK,
Attorney for Defendant.

[W. E. Andrews Patent No. 2,160,349 is set out in full, pages 82 to 84 of the Book of Exhibits.]

[C. J. Dorsey Patent No. 725,684 is set out in full, pages 86 to 88 of the book of Exhibits.]

Receipt of Copy acknowledged.

[Endorsed]: Filed September 4, 1954. [36]

[Title of District Court and Cause.]

ANSWER TO DEFENDANTS'
INTERROGATORIES TO PLAINTIFFS

To William C. Babcock and Frederick E. Mueller,
Attorneys for Defendant Como F. Norris, 1203
Heartwell Building, Long Beach, California:

The following are the answers of the plaintiff
Homer E. Gillespie to the interrogatories numbered
1 to 29, directed to the plaintiff to be answered pur-
suant to Rule 33:

Answer to interrogatory No. 1:

Claims 1, 2, 11, 12, 13 and 14.

Answer to interrogatory No. 2:

Yes.

Answer to interrogatory No. 3:

Yes.

Answer to interrogatory No. 4:

Yes.

Answer to interrogatory No. 5:

Yes. [44]

Answer to interrogatory No. 6:

Yes.

Answer to interrogatory No. 7:

Yes.

Answer to interrogatory No. 8:

Yes.

Answer to interrogatory No. 9:

Yes.

Answer to interrogatory No. 10:

- (a) Approximately September 19, 1946.
- (b) Approximately April 5, 1947.
- (c) October, 1946.
- (d) Same as c.

Answer to interrogatory No. 11:

- (a) No.
- (b) No.
- (c) Yes.
- (d) Yes.
- (e) Yes.
- (f) No.

Answer to interrogatory No. 12:

Dean Gill, 4208 Tulane Avenue, Long Beach,
California.

Answer to interrogatory No. 13:

Plaintiff does not understand the question.

Answer to interrogatory No. 14:

See answers to interrogatories Nos. 11 and 12.

Answer to interrogatory No. 15:

- (a) Yes.
- (b) Yes.
- (c) Yes.
- (d) Yes.
- (e) Yes.
- (f) No. [45]
- (g) Yes.
- (h) Yes.

Answer to interrogatory No. 16:

Defendant and Sicking Distributing Company, Los Angeles, California.

Answer to interrogatory No. 17:

Yes.

Answer to interrogatory No. 18:

(a) No.

(b) No.

(c) Yes.

Answer to interrogatory No. 19:

(a) No.

(b) No.

(c) Yes.

Answer to interrogatory No. 20:

Yes.

Answer to interrogatory No. 21:

Yes, if restricted and limited to the sweep means illustrated only.

Answer to interrogatory No. 22:

No.

Answer to interrogatory No. 23:

It is my understanding that defendant uses and has used, and manufactures and has manufactured rectangular fields only.

Answer to interrogatory No. 24:

The premise is untrue, no such machine was built or publicly used during 1946.

Answer to interrogatory No. 25:

June 23, 1947.

Answer to interrogatory No. 26:

No. [46]

Answer to interrogatory No. 27:

Yes.

Answer to interrogatory No. 28:

July 10, 1952.

Answer to interrogatory No. 29:

“Patent pending” was placed upon all machines used or sold publicly since June 23, 1947. No machines were manufactured since issuance of patent.

/s/ HOMER E. GILLESPIE.

Subscribed and sworn to before me this 8th day of October, 1954.

[Seal] /s/ ERIC A. ROSE,

Notary Public in and for the County of Los Angeles,
State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 9, 1954. [47]

[Title of District Court and Cause.]

RESPONSE TO REQUEST TO ADMISSION

Plaintiff Homer E. Gillespie makes the following admissions and denials on the Request for Admission served on the defendant by plaintiff:

Request 1:

Admitted.

Request 2:

Admitted if confined to sweep means only,
otherwise denied.

Request 3:

Admitted.

Request 4:

Admitted.

Request 5:

Admitted if confined to sweep means, other-
wise denied.

Request 6:

Denied. [49]

Request 7:

Admitted if confined to Patent Office actions,
otherwise denied.

Request 8:

Denied.

Request 9:

Denied if applied to the patent involved in
the instant case.

Request 10:

Admitted.

Request 11:

Admitted.

Request 12:

Denied if applied to the patent involved in the instant case.

Request 13:

Admitted.

Request 14:

Admitted.

Request 15:

Denied. Reference is made to the parent application being serial number 756523, filed June 23, 1947.

Request 16:

Denied.

Request 17:

Admitted.

Request 18:

Denied. (The undersigned is unable to understand the request for admission except for matters covered in Request 17.)

Request 19:

Denied. [50]

For clarification, the passage of the amendment apparently alluded to states correctly as follows:

“The rejection of Claims 1 to 11 on the grounds of an old combination is believed to be erroneous because applicant is not claiming broadly the combination of a missile-launching means, a playing surface, and a sweep. Applicant, in Claims 1 to

7, is claiming a particular structure in which a disk-like playing piece is trajected from a launching platform disposed a sufficient distance above the playing field so that the disk falls upon the selected target on the playing field, assuming that the skill of the operator is sufficient to put the playing piece through the correct trajectory to fall upon the selected spot. There is no rolling or sliding of the playing pieces. They are trajected from the platform through the air, as indicated in each of the claims. This distinguishes the applicant's type of game from the broad classification set up by the Examiner in the broad terms of a missile-launching means, a playing surface and a sweep. The entirely different disposition of the launching platform, well above the playing field so that the skill of the operator in launching the playing pieces through the air determines the position where the playing piece rests on the field, makes this a new arrangement in which a new method of operation results."

/s/ HOMER E. GILLESPIE.

Subscribed to and Sworn to before me this 8th day of October, 1954.

[Seal] /s/ ERIC A. ROSE,
Notary Public in and for County of Los Angeles,
State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 9, 1954. [51]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT
OR TO DISMISS

Defendants move the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in the Defendants' favor dismissing the complaint and for the relief demanded in defendants' counter-claim, on the ground that there is no genuine issue as to any material fact and the defendants are entitled to a judgment as a matter of law.

This motion is based upon:

- (a) 35 U. S. C. S 102.
- (b) Affidavit of Ella Striegel.
- (c) Affidavit of Harold A. Ludwig.
- (d) Affidavit of Victor A. Murray.
- (e) Affidavit of Basil E. Norris.
- (f) Affidavit of William C. Babcock.
- (g) Affidavit of Coma F. Norris. [53]

together with defendants' Memorandum in Support of said Motion for Summary Judgment, filed and served herewith, and the records and files of the above-entitled cause.

In the alternative, defendants move the Court for an order striking out plaintiffs' complaint and dismissing the action with prejudice and with costs to defendants upon the ground that on September 2, 1954, defendants duly served on plaintiffs interrogatories pursuant to Rule 33 of the Federal

Rules of Civil Procedure, which interrogatories are now on file in the office of the Clerk of this Court; that more than fifteen days have elapsed and plaintiffs have wilfully failed to answer or object to said interrogatories.

WILLIAM C. BABCOCK,
FREDERICK E. MULLER,

By/ s/ WILLIAM C. BABCOCK,
Attorneys for Defendants.

[Endorsed]: Filed October 16, 1954. [54]

[Title of District Court and Cause.]

AFFIDAVIT IN PROOF OF
ADMISSION OF FACTS

State of California,
County of Los Angeles—ss.

William C. Babcock, being duly sworn, deposes and says:

1. That he is one of the attorneys for defendants herein;

2. That on September 2, 1954, pursuant to affiant's direction, a request for admission of facts pursuant to Rule 36 of the Federal Rules of Civil Procedure was served upon Eric A. Rose, attorney for the plaintiffs. On September 6, 1954, a copy of said request for admission was filed with the Clerk of this Court, together with proof of service thereof.

A copy of said request is attached hereto, marked Exhibit 1.

3. No denial, admission, or other answer to said request has been served upon affiant or upon any other person authorized [55] to receive such answers on behalf of defendants by said attorney for plaintiffs or by any other person. More than ten days have elapsed since the service of said request for admission pursuant to Rule 36.

/s/ WILLIAM C. BABCOCK.

Subscribed and Sworn to before me this 12th day of October, 1954.

[Seal] /s/ ALICE M. McCULLOUGH,
Notary Public in and for
Said County and State.

My Commission Expires June 17, 1957.

[Endorsed]: Filed October 16, 1954. [56]

[Title of District Court and Cause.]

AFFIDAVIT OF HAROLD A. LUDWIG

State of Nevada,
County of Clark—ss.

Harold A. Ludwig being duly sworn, deposes and says:

That during the years 1946 and 1947, affiant was employed by the owners of Virginia Park, situated

in the City of Long Beach, State of California, as business manager of this property;

That Virginia Park is an area located on the ocean front in downtown Long Beach, through which extends a thoroughfare lined with concessions, rides, and various places of amusement, said thoroughfare being known as The Pike;

That a portion of affiant's duties as business manager of said Virginia Park involved the renting and supervising of concessions, rides, and places of amusement along the portion [62] of said Pike extending therethrough;

That in 1946, no later than August of that year, affiant was approached by Coma F. Norris for permission to place a penny pitch in the center of a portion of said Pike;

That affiant gave said Coma F. Norris tentative permission to place said penny pitch in such location, but on the condition that said permission could be revoked at any time;

That affiant inspected said penny pitch after it was installed by Coma F. Norris on said Pike in Virginia Park, and witnessed and observed it while in operation on numerous occasions in connection with affiant's duties as business manager, with particular reference as to whether the installation thereof was advantageous or detrimental to the operation of the Virginia Park area;

That affiant, as a result of said inspection and

numerous observations, knows that said penny pitch was in the form of an elongate rectangular box that has a bottom, the upper surface of which bottom is subdivided into a number of squares that serve as targets on which patrons of the device seek to traject pennies. Each successful placing of a penny within the confines of one of said square targets results in the patron winning a number of pennies, the quantity of which is determined by a numeral marked on said bottom surface within said square;

That said penny pitch box was formed with four side walls, three of which terminate on their upper edge portions in horizontally situated platforms;

That said penny pitch box has a transparent cover horizontally disposed across the top thereof, said cover so supported relative to said platforms as to define a continuous narrow slit-like opening therewith, and said opening permitting pennies resting on said platforms to be trajected therethrough onto said bottom in an attempt to secure a winning score; [63]

That said penny pitch included a transversely disposed bar that could be moved longitudinally over said bottom surface by the operator of the game to sweep pennies from said surface into a chute from which said pennies were discharged to a suitable receptacle;

That the structure of said penny pitch is the same as the structure of said penny pitch shown on the attached photographs, which photographs are iden-

tified as Exhibits "A," "B" and "C," and made a part hereof;

That said bottom and target squares are shown in Exhibit "A" and identified by the numeral 1;

That said side walls of said penny pitch are shown in Exhibits "B" and "C," and identified by the numeral 2;

That said cover of said penny pitch is shown in Exhibits "B" and "C," and identified by the numeral 3;

That said platform of said penny pitch is shown in Exhibits "A," "B" and "C," and identified by the numeral 4;

That said slit-like opening defined by said cover and said platform is shown in Exhibits "A" and "B" and identified by the numeral 5;

That after said penny pitch had been installed approximately four months on the portion of said Pike extending through Virginia Park, affiant found that it was not advantageous to the Virginia Park property to have this installation continue, and affiant notified Coma F. Norris to immediately remove same from said property;

That Coma F. Norris did remove said penny pitch from said property in compliance with affiants' order.

/s/ HAROLD A. LUDWIG.

Subscribed and Sworn to before me this 2nd day
of Sept., 1954.

[Seal] /s/ ROBERT M. CALLISTER,
Notary Public in and for Said
County and State.

My Commission expires January 3, 1955.

[Endorsed]: Filed October 16, 1954. [64]

[Title of District Court and Cause.]

AFFIDAVIT OF VICTOR A. MURRAY

State of California,
County of Los Angeles—ss.

Victor A. Murray being duly sworn, deposes and
says:

That during the year 1946 he was in the business
of doing cabinet work and other carpentering as an
independent operator in the City of Long Beach,
State of California;

That on or about the 1st of March, 1946, a Coma
F. Norris approached him to build a penny pitch,
which Mr. Norris informed affiant would be used
on The Pike in Long Beach;

That Mr. Norris at the time of requesting affiant
to build said penny pitch, supplied affiant with
material and rough sketches showing a specific

structure that Mr. Norris desired embodied in said penny pitch;

That affiant within the following two months built [68] said penny pitch for Mr. Norris and delivered said penny pitch to him, and on May 7, 1946, was paid for said labor in building said penny pitch by a check in the amount of \$175.00 given to affiant by Mr. Norris, which check is attached hereto and identified as Exhibit "D" and made a part hereof;

That affiant, as a result of said construction, knows that said penny pitch was in the form of an elongate rectangular box that has a bottom, the upper surface of which bottom is subdivided into a number of squares that serve as targets on which patrons of the device seek to traject pennies. Each successful placing of a penny within the confines of one of said square targets results in the patron winning a number of pennies, the quantity of which is determined by a numeral marked on said bottom surface within said square;

That said penny pitch box was formed with four side walls, three of which terminate on their upper edge portions in horizontally situated platforms;

That said penny pitch box has a transparent cover horizontally disposed across the top thereof, with said cover so supported relative to said platforms as to define a continuous narrow slit-like opening therewith, and said opening permitting pennies resting on said platforms to be trajected there-

through onto said bottom in an attempt to secure a winning score;

That said penny pitch included a transversely disposed bar that could be moved longitudinally over said bottom surface by the operator of the game to sweep pennies from said surface into a chute from which said pennies were discharged to a suitable receptacle;

That the structure of said penny pitch is the same as the structure of said penny pitch shown on the attached photographs, which photographs are identified as Exhibits "A," "B" and "C," and made a part hereof; [69]

That said bottom and target squares are shown in Exhibit "A" and identified by the numeral 1;

That said side walls of said penny pitch are shown in Exhibits "B" and "C," and identified by the numeral 2;

That said cover of said penny pitch is shown in Exhibits "B" and "C," and identified by the numeral 3;

That said platform of said penny pitch is shown in Exhibits "A," "B" and "C," and identified by the numeral 4;

That said slit-like opening defined by said cover and said platform is shown in Exhibits "A" and "B" and identified by the numeral 5.

/s/ VICTOR A. MURRAY.

Subscribed and Sworn to before me this 19th day of August, 1954.

[Seal] /s/ ALICE M. McCULLOUGH,
Notary Public in and for Said
County and State.

My Commission Expires June 17, 1957.

[Exhibits A, B, C, and D, see pages 99, 100, 101, 102 of the Book of Exhibits.]

[Endorsed]: Filed October 16, 1954. [70]

[Title of District Court and Cause.]

AFFIDAVIT OF BASIL E. NORRIS

State of California,
County of Los Angeles—ss.

Basil E. Norris being duly sworn, deposes and says:

That he is the brother of Coma F. Norris, the defendant in this action;

That between August and November of 1946, he operated a penny pitch located in that portion of the Pike that extends through Virginia Park, in the City of Long Beach, State of California, for said defendant, and as a result of said operating, knows that the structure of said penny pitch embodied an elongate rectangular box that has a bottom, the upper surface of which bottom is subdi-

vided into a number of squares that serve as targets on which patrons of the device seek to traject pennies. [75] Each successful placing of a penny within the confines of one of said square targets results in the patron winning a number of pennies, the quantity of which is determined by a numeral marked on said bottom surface within said square;

That said penny pitch box was formed with four side walls, three of which terminate on their upper edge portions in horizontally situated platforms;

That said penny pitch box has a transparent cover horizontally disposed across the top thereof, said cover so supported relative to said platforms as to define a continuous narrow slit-like opening therewith, and said opening permitting pennies resting on said platforms to be trajected therethrough onto said bottom in an attempt to secure a winning score;

That said penny pitch included a transversely disposed bar that could be moved longitudinally over said bottom surface by the operator of the game to sweep pennies from said surface into a chute from which said pennies were discharged to a suitable receptacle;

That the structure of said penny pitch is the same as the structure of said penny pitch shown on the attached photographs, which photographs are identified as Exhibits "A," "B," and "C," and made a part hereof;

That said bottom and target squares are shown in Exhibit "A" and identified by the numeral 1;

That said side walls of said penny pitch are shown in Exhibits "B" and "C," and identified by the numeral 2;

That said cover of said penny pitch is shown in Exhibits "B" and "C," and identified by the numeral 3;

That said platform of said penny pitch is shown in Exhibits "A," "B," and "C," and identified by the numeral 4;

That said slit-like opening defined by said [76] cover and said platform is shown in Exhibits "A" and "B" and identified by the numeral 5.

/s/ BASIL E. NORRIS.

Subscribed and sworn to before me this 9th day of July, 1954.

[Seal] /s/ ALICE M. McCULLOUGH,
Notary Public in and for Said
County and State.

My Commission Expires June 17, 1957.

[Endorsed]: Filed October 16, 1954. [77]

[Title of District Court and Cause.]

AFFIDAVIT OF COMA F. NORRIS

State of California,
County of Los Angeles—ss.

Coma F. Norris, being duly sworn, deposes and says:

That affiant is the defendant in the above-captioned action;

That affiant has personal knowledge of the matters hereinafter referred to and makes this affidavit in support of defendants' Motion for Summary Judgment;

That affiant has carefully read and studied a copy of United States Letters Patent No. 2,595,669 entitled "Disk Game Apparatus," issued May 6, 1952, to Gillespie Games Company, a corporation of California, and he fully comprehends the alleged invention disclosed therein;

That affiant is familiar with game devices of the general [81] type represented by the alleged invention disclosed in said patent, inasmuch as he has made, used or sold similar game devices for at least the past eight (8) years, and prior to 1946;

That since May 6, 1952, the issue date of said patent, affiant has not made, used or sold game devices of the type disclosed in said patent in which the playing field is circular in shape, or in which the means for displacing playing pieces from said

field is a horizontal sweep pivotally mounted at the center of said field to a rotatable shaft that permits rotation of said sweep to displace playing pieces from said field.

That affiant has not, since May 6, 1952, made, used or sold a game device which can be included within the scope of any of the claims of said patent, if said claims be interpreted to embody the limitation of a playing field which is circular.

/s/ COMA F. NORRIS.

Subscribed and sworn to before me this 7th day of October, 1954.

/s/ ALICE M. McCULLOUGH,
Notary Public in and for Said
County and State.

My Commission Expires June 17, 1957.

[Endorsed]: Filed October 16, 1954. [82]

[Title of District Court and Cause.]

AFFIDAVIT OF ELLA STRIEGEL

State of California,
County of Los Angeles—ss.

Ella Striegel being duly sworn, deposes and says:

That during the year 1946 she was employed by Coma F. Norris for a period of approximately one month to operate a penny pitch that was located

on that portion of The Pike in the City of Long Beach, State of California, that extends through an area known as Virginia Park;

That affiant as a result of her operation of said penny pitch, knows that the structure of said device was in the form of an elongate rectangular box that had a bottom, the upper surface of which bottom is subdivided into a number of squares that serve as targets on which patrons of the device seek to traject pennies. Each successful placing of a penny within the [83] confines of one said square targets results in the patron winning a number of pennies, the quantity of which is determined by a numeral marked on said bottom surface within said square;

That said penny pitch box was formed with four side walls, three of which terminate on their upper edge portions in horizontally situated platforms;

That said penny pitch box has a transparent cover horizontally disposed across the top thereof, said cover so supported relative to said platforms as to define a continuous narrow slit-like opening therewith, and said opening permitting pennies resting on said platforms to be trajected therethrough onto said bottom in an attempt to secure a winning score;

That said penny pitch included a transversely disposed bar that could be moved longitudinally over said bottom surface by the operator of the game to sweep pennies from said surface into a chute from

which said pennies were discharged to a suitable receptacle;

That the structure of said penny pitch is the same as the structure of said penny pitch shown on the attached photographs, which photographs are identified as Exhibits "A," "B," and "C," and made a part thereof;

That said bottom and target squares are shown in Exhibit "A" and identified by the numeral 1;

That said side walls of said penny pitch are shown in Exhibits "B" and "C," and identified by the numeral 2;

That said cover of said penny pitch is shown in Exhibits "B" and "C" and identified by the numeral 3;

That said platform of said penny pitch is shown in Exhibits "A," "B," and "C," and identified by the numeral 4;

That said slit-like openings defined by said cover and said platform is shown in Exhibits "A" and "B" and identified [84] by the numeral 5.

/s/ ELLA M. STRIEGEL.

Subscribed and sworn to before me this 16th day of August, 1954.

[Seal] /s/ ALICE M. McCULLOUGH,
Notary Public in and for Said
County and State.

[Endorsed]: Filed October 16, 1954. [85]

[Title of District Court and Cause.]

AFFIDAVIT OF HOMER E. GILLESPIE

State of California,

County of Los Angeles—ss.

Homer E. Gillespie being first duly sworn, deposes and says:

That affiant is the plaintiff in the above-entitled action;

That affiant has read the affidavits of Ella Striegel, Harold A. Ludwig and Basil E. Norris;

That affiant knows of his own knowledge that during the year of 1946 there was located approximately in the center of the Pike extending through the Virginia Park amusement area an open pit, conventional type penny pitch having no transparent cover horizontally disposed across the top thereof, [92] and consisting of a flat playing field raised above the pavement and a fenced-off area surrounding said field;

That during the year of 1946, affiant visited the Pike at the place indicated in the above-named affidavits at least once each month and affiant never saw at the places indicated or any other place the device described in the above-named affidavits;

That affiant left the County of Los Angeles on the 25th day of August on a business trip to San Francisco and the northern part of this state, and did not return to the County of Los Angeles until the 2nd day of October, 1954, when he found at his residence a communication from his attorney advising him to contact his office immediately;

That on the 4th day of October, 1954, affiant contacted his attorney and furnished the information required for the preparation of the pleadings entitled "Response to Request for Admission" and "Answer to Defendant's Interrogatories to Plaintiffs," that he signed said pleadings on the 8th day of October, 1954, and that he was present when defendant's attorneys refused acceptance of a copy thereof;

That affiant has read the affidavit of Coma F. Norris and Victor A. Murray;

That the machine described in the last-named affidavit was placed in operation on the Pike at Long Beach, California, in the summer of 1948, after affiant's machine, embodying the elements of affiant's patent was furnished to defendant, and placed in his place of business during the month of April, 1948;

That defendant has used game devices disclosed in affiant's patent since May 6th, 1952, in the County of Los Angeles, State of California, and before that date, to [93] wit: since the summer of 1948, but not before said date.

/s/ HOMER E. GILLESPIE.

Sworn and subscribed to before me this 16th day of October, 1954.

[Seal]

ERIC A. ROSE,

Notary Public in and for Said
County and State.

[Endorsed]: Filed October 18, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF ERIC A. ROSE

State of California,
County of Los Angeles—ss.

Eric A. Rose, being first duly sworn, deposes and says:

That he is one of the attorneys for plaintiffs in the above-entitled action;

That he has read the affidavit of William C. Babcock, entitled Affidavit in Proof of Admission of Facts, subscribed and sworn to on the 12th day of October, 1954:

That the representations made in paragraph 3 thereof, and each and every part thereof, are false and untrue; [95]

That on the 8th day of October, 1954, commencing at the hour of 10 o'clock a.m., of said day, the deposition of the defendant Coma F. Norris was taken in the office of affiant in the presence of both of his attorneys;

That at the hour of 12:15 p.m., of said day, affiant offered to Mr. Babcock a copy of "Response to Request for Admission" and a copy of "Answer to Defendant's Interrogatories to Plaintiffs" in the presence of plaintiff, defendant, and Mr. Mueller, and requested Mr. Babcock to acknowledge receipt of these copies;

That Mr. Babock refused to receive said copies and refused to acknowledge receipt thereof;

That in view of this refusal affiant caused copies of such pleadings to be mailed to said attorneys for plaintiff on said day, the 8th day of October, 1954, as appears from the affidavit of mailing of Dorothy J. Blanchard on file herein;

That on said 8th day of October, 1954, affiant informed both attorneys for defendant, that plaintiff Homer E. Gillespie had left the County of Los Angeles on a business trip to San Francisco and the northern part of the State of California and did not return to the County of Los Angeles until the 2nd day of October, 1954, as more fully appears from the affidavit of Homer E. Gillespie, concurrently served and filed herewith.

Further affiant sayeth not.

/s/ ERIC A. ROSE.

Sworn and subscribed to before me this 16th day of October, 1954.

[Seal] /s/ WALTER S. BROWN,
Notary Public in and for Said
County and State.

[Endorsed]: Filed October 18, 1954. [96]

[Title of District Court and Cause.]

AFFIDAVIT OF EDWARD NAGEL

State of California

County of Los Angeles—ss:

Edward Nagel, being duly sworn, deposes and says:

That affiant was employed by defendant Coma F. Norris from the day he opened the first Arcade to wit, July 2nd, 1944, to and including November 28th, 1948, as a mechanic with the specific duty to keep the amusement machines in operating condition and to make such repairs as became necessary from time to time;

That affiant is familiar with, and knows, the machine operated by Coma F. Norris, and owned by Homer E. Gillespie during the month of April, 1948, which had a round playing field, vertical walls extending therefrom upwardly, a launching platform, adjacent to the top, a transparent cover forming a slot-like opening with said platform, so that playing pieces could be propelled from the platform through the slot-like [98] opening upon the circular playing field. The playing field employed a circular sweep.

That during the time the Gillespie machine was being operated in the Arcade, to wit: during the month of April, 1948, Coma F. Norris requested affiant to prepare drawings, copying the essential elements of the Gillespie machine, but to use a

rectangular playing field; in accordance with said instructions, affiant prepared said drawings, using the Gillespie machine, and assisted in the developing of the penny pitch machine which was put in operation in the summer of 1948;

That said machine, when returned from the carpenter comprised a rectangular playing field, vertical walls surrounding said playing field, a launching platform adjacent to the top of one long side of said machine and a transparent cover covering said box-like structure and elevated slightly above the launching platform so as to permit playing pieces to be propelled from the launching platform through said slot onto the rectangular playing field.

Affiant knows of his own knowledge and hereby states that no machine embodying a launching platform, a transparent cover, and a slot-like opening between the platform and the cover, was employed, operated, used, stored or exhibited by said Coma F. Norris either in the Arcade, in any place of business operated by him, on the Pike extending through Virginia Park or in any of the storage rooms owned by said Coma F. Norris, or leased or rented by him up to the time affiant constructed the above-described machine.

That during 1946, said Coma F. Norris owned and operated a penny pitch of the conventional type in which a playing field is raised above the pavement and players throw playing pieces onto said playing field from a predetermined distance,

said playing field being surrounded by an open pit [99] into which an operator sweeps the playing pieces at the conclusion of the game;

That during 1946 affiant was charged with servicing the machines owned by said Coma F. Norris and he knows of his own knowledge that no machine was owned, operated or used by said Coma F. Norris during said year which comprised a launching platform, a transparent cover, and a slot-like opening formed between said launching platform and said transparent cover;

That affiant knows of his own knowledge that no such machine was stored in any storage room for machines owned, rented or leased by said Coma F. Norris between 1944 and 1948.

/s/ EDWARD NAGEL.

Sworn and subscribed to before me this 18th day of October, 1954.

[Seal] /s/ ERIC A. ROSE,

Notary Public in and for Said
County and State.

[Endorsed]: Filed October 20, 1954. [100]

[Title of District Court and Cause.]

AFFIDAVIT OF ALVIN B. COBBLE

State of California,

County of Los Angeles—ss.

Alvin B. Cobble, being first duly sworn, deposes and says:

That he is employed by the City of Long Beach as a police officer, to wit: Sergeant, and has been employed as police officer of said city since 1936.

That affiant was in charge of the vice squad of the police department of the City of Long Beach from December 1st, 1945, to June of 1949;

That it was one of the duties of affiant to patrol the area known as the Pike extending through Virginia Park; that affiant visited and patrolled said Pike extending through Virginia Park five (5) days each week during the time that he was in charge of the vice squad, to wit: from December 1st, 1945, to June, 1949;

That affiant has inspected Exhibits A, B and C attached to the affidavit of Basil E. Norris;

That no such device was being operated or used on the Pike extending through Virginia Park during the years 1944, 1945 and [102] 1946; that affiant remembers complaints being filed with his department concerning a penny pitch game being operated on the Pike extending through Virginia Park on the ground that such game was a game of chance rather than of skill; that affiant investi-

gated said complaints and inspected a penny pitch game consisting of a platform having a playing field and raised above the ground and a pit surrounding said playing field; that in operation persons would attempt to throw coins from a predetermined distance onto said open playing field and after the conclusion of the game an operator would sweep the coins into the open pit surrounding said playing field; that affiant determined that the game was one of skill rather than chance; that said device was being operated at that time on the Pike in the area extending through Virginia Park; that said game had no transparent cover, had no launching platform from which coins could be trajected onto said playing field and did not have a slot-like opening through which such coins could be trajected onto the playing field;

That the above-stated matters are within the knowledge of affiant and are not based upon information or belief.

/s/ ALVIN B. COBBLE.

Subscribed and sworn to before me this 22nd day of October, 1954.

[Seal] /s/ ERIC A. ROSE,

Notary Public in and for Said
County and State.

Receipt of copy acknowledged. [103]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties to the above-entitled action through their respective attorneys:

That the attached exhibit is a true and correct copy of Patent No. 2,595,669 issued to Homer E. Gillespie on May 6, 1952.

It Is Further Stipulated that said copy may be used with the same force and effect in all proceedings in the above-entitled action as if it were the original patent grant.

Dated this 26th day of October, 1954.

ERIC A. ROSE and
ALBERT D. WHITE,

By /s/ ERIC A. ROSE,
Attorneys for Plaintiff.

WILLIAM C. BABCOCK and
FREDERICK E. MUELLER,

By /s/ FREDERICK E. MUELLER,
Attorneys for Defendants.

It is so ordered, November 3, 1954.

/s/ WM. C. MATHES,
Judge.

[H. E. Gillespie Patent No. 2,595,669 is set out in full, pages 89 to 98 of the Book of Exhibits.]

[Endorsed]: Filed November 3, 1954. [105]

[Title of District Court and Cause.]

AFFIDAVIT OF VICTOR A. MURRAY

State of California,

County of Los Angeles—ss.

Victor A. Murray being duly sworn, deposes and says:

That during the year 1946 affiant was in the business of doing cabinet work and other carpentering as an independent operator in the City of Long Beach, State of California;

That affiant has read an affidavit made by Edward Nagel dated October 18, 1954, that was filed in connection with the above-identified case;

That on or about the 1st day of March, 1946, Coma F. Norris approached affiant and requested that he build a penny pitch, which Mr. Norris informed affiant would be used on The Pike in Long Beach, California;

That prior to constructing said penny pitch, as set forth in affiant's affidavit dated August 19, 1954 filed herein, affiant personally called upon Mr. Norris at his place of business at [116] 333 West Pike, Long Beach, California, at Mr. Norris' request in order that Mr. Norris could explain and outline to affiant the details of construction and operation of said penny pitch, and at which time Mr. Norris made drawings of said penny pitch in affiant's presence disclosing the structure thereof which Mr. Norris desired incorporated therein,

which drawings affiant subsequently used in constructing said penny pitch;

That at no time has affiant received or been supplied with drawings, sketches, or any other descriptive material whatsoever relating to amusement devices, which were prepared by one Edward Nagel, nor has said Edward Nagel at any time ever assisted affiant in the development of or actual construction of an amusement device of any nature, whatsoever, penny pitch, or otherwise.

/s/ VICTOR A. MURRAY.

Subscribed and sworn to before me this 2nd day of November, 1954.

[Seal] /s/ ALICE M. McCULLOUGH,
Notary Public in and for Said
County and State.

My Commission Expires June 17, 1957.

[Endorsed]: Filed November 15, 1954. [117]

[Title of District Court and Cause.]

AFFIDAVIT OF COMA F. NORRIS

State of California,
County of Los Angeles—ss.

Coma F. Norris being duly sworn, deposes and says:

That affiant has read the affidavit filed herein and sworn to by one Edward Nagel on October 18, 1954;

That affiant knows that statements made in said affidavit are completely untrue and without foundation;

That said Edward Nagel was employed by affiant from July 6, 1944, through November 28, 1948, in the capacity of a mechanic to repair amusement device maintained by affiant at his place of business located at 333 West Pike, Long Beach, California;

That affiant discharged said Edward Nagel due to the fact that Mr. Nagel not only failed to maintain said machines in good repair, but also became increasingly arrogant, insolent and surly in his employee relationships with affiant and affiant's other employees as well as toward affiant's customers, and during [130] his last of year of employment by affiant, developed a markedly indolent attitude regarding the duties for which he was responsible and was hired to do;

That at no time did affiant ever request or even suggest that said Edward Nagel make a drawing of the Homer E. Gillespie machine during the month of April, 1948, when affiant permitted said Gillespie to try out his machine in said affiant's place of business, nor did affiant request said Nagel, nor did said Nagel at any time do any development work for affiant on a penny pitch machine of any nature whatsoever;

That the drawing from which Victor A. Murray, a carpenter employed by affiant, built affiant's

penny pitch, was prepared by affiant in said Murray's presence, and said Edward Nagel's sworn statement pertaining to the preparation of said drawing is completely false and has no basis of fact;

That at no time during the period in which Edward Nagel was employed by affiant, did affiant disclose any details of his business affairs to said Nagel, nor did said Nagel have access to affiant's books or confidential reports, whereby said Nagel could obtain accurate knowledge of equipment purchased or sold by affiant other than that maintained in affiant's said place of business; nor did affiant furnish said Nagel with any information pertaining to equipment leased by affiant other than that equipment maintained in his said place of business, nor did affiant inform said Nagel as to what equipment was stored by affiant other than that which was removed from affiant's said place of business on The Pike;

That in carrying out his duties as a mechanic in affiant's employ said Nagel could not possibly have acquired sufficient knowledge to enable him to truthfully make the statements contained on Page 2, lines 19-27, and Page 3, lines 3-8, of his affidavit dated October 18, 1954, filed herein, which statements [131] as borne out by the true facts sworn to herein are nothing more than Mr. Nagel's personal opinion, or rumors and hearsay that he may have picked up during the last year of his employment by affiant;

That in actual fact, said Nagel had no knowledge other than opinion as to the subject matter contained on Page 2, in lines 19-27, and Page 3, lines 3-8, of his affidavit executed October 18, 1954.

/s/ COMA F. NORRIS.

Subscribed and sworn to before me this 2nd day of November, 1954.

[Seal] /s/ ALICE M. McCULLOUGH,
Notary Public in and for said
County and State.

My commission expires June 17, 1957.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 15, 1954. [132]

[Title of District Court and Cause.]

ORDER ON DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

This cause having come before the Court for hearing on defendants' motion, filed October 16, 1954, for a summary judgment of dismissal on the merits, and the motion having been argued and submitted for decision; and it appearing to the Court:

(1) that there is no genuine issue of fact as to the contents of either the Letters Patent No. 2,595,669 in suit or the "file wrappers" reciting

the Patent-Office proceedings leading to the issuance thereof;

(2) that there is no genuine issue of fact [153] as to the existence or contents of prior-art patent No. 725,684 issued April 21, 1903, to Dorsey, or of prior-art patent No. 2,160,349 issued May 30, 1939, to Andrews;

(3) that assuming all facts in issue to be as plaintiffs contend them to be, no trier of fact could reasonably find that the device described in any of the claims in suit of Letters Patent No. 2,595,669 is either new or the result of invention or discovery [35 U.S.C. §§ 100, 101, 102]; and

(4) that defendants are entitled to a finding, based upon the uncontradicted evidence, that the claims in suit of Letters Patent No. 2,595,669 are invalid for want of invention [see *Jaccuzi Bros. v. Berkeley Pump Co.*, 191 F. 2d 632, 634 n.4, 637 (9th Cir. 1951)], and to judgment as a matter of law dismissing plaintiffs' action for infringement upon the merits [cf. *Park-In Theatres v. Perkins*, 190 F.2d 137, 142 (9th Cir. 1951); *Steigleder v. Eberhard Faber Pencil Co.*, 176 F.2d 604 (1st Cir.), cert. denied, 338 U.S. 893 (1949)];

It Is Ordered that defendants' motion for summary judgment is hereby granted, and that defendants lodge with the Clerk within ten days findings of fact, conclusions of law and judgment of dismissal on the merits, to be settled pursuant to local rule 7.

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail on the attorneys for the parties appearing in this cause.

December 16, 1954.

/s/ WM. C. MATHES,

United States District Judge.

[Endorsed]: Filed December 16, 1954. [154]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on to be heard on Motion of Defendants for Summary Judgment, and the Court having considered the pleadings and papers on file herein, finds the facts and states the Conclusions of Law as follows:

Findings of Fact

(1) That there is no genuine issue of fact as to the contents of either the Letters Patent No. 2,595,669 in suit, or the "file wrappers" reciting the Patent Office proceedings leading to the issuance thereof.

(2) That there is no genuine issue of fact as to the existence [155] or contents of prior art patent No. 725,684, issued April 21, 1903, to Dorsey,

or of prior art patent No. 2,160,349, issued May 30, 1939, to Andrews.

(3) That neither of the prior art patents mentioned in Paragraph 2 hereof was cited in the Patent Office proceedings leading to the issuance of said Letters Patent No. 2,595,665 in suit.

Conclusions of Law

(1) That Claims 1, 2, 3, 11, 12, 13 and 14 of said Letters Patent in suit are clearly invalid for the reasons that the device described in each of said claims is not new and is totally lacking in invention.

(2) Claims 1, 2, 3, 11, 12, 13 and 14 of said Letters Patent in suit are clearly invalid for the reason that the invention of the device described therein was patented in the United States more than one year prior to the date of application for said Letters Patent in suit.

Dated December 30, 1954.

/s/ WM. C. MATHES,

United States District Judge.

Affidavit of Service by Mail attached.

Lodged December 27, 1954.

[Endorsed]: Filed December 30, 1954. [156]

In the District Court of the United States, Southern District of California, Central Division

Civil Action No. 16,858-WM

HOMER E. GILLESPIE, CATHERINE L. GILLESPIE, GILLESPIE GAMES COMPANY, a California Corporation,

Plaintiffs,

vs.

COMA F. NORRIS, Individually and Doing Business as C. F. NORRIS MANUFACTURING COMPANY; DOE ONE, DOE TWO, DOE THREE, DOE FOUR and DOE FIVE,

Defendants.

JUDGMENT FOR DEFENDANTS

This cause having come on to be heard on Motion of Defendants for a Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and the Court having considered the pleadings in the action and all of the papers on file herein and all of the affidavits submitted in support of and in opposition to Defendants' Motion, and having heard oral argument, and having found that there is no genuine issue of fact to be submitted to the trial court,

And the Court having made an order granting Defendants' Motion for Summary Judgment and to Dismiss this action on the [158] merits, it is hereby

Ordered, Adjudged and Decreed That:

1. United States Letters Patent No. 2,595,669 issued May 6, 1952, to Gillespie Games Company, Long Beach, California, a California corporation, is invalid as to Claims 1, 2, 3, 11, 12, 13 and 14 thereof.

2. This action is hereby dismissed on the merits and that Defendants recover their costs to be taxed by the clerk.

Costs taxed at \$176.23.

Dated December 30, 1954.

/s/ WM. C. MATHES,

United States District Judge.

Affidavit of Service by Mail attached.

Lodged December 27, 1954.

[Endorsed]: Filed and entered December 30, 1954. [159]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Homer E. Gillespie, Catherine L. Gillespie, and Gillespie Games Company, a California corporation, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final

judgment entered in this action on the 30th day of December, 1954.

ERIC A. ROSE and
ALBERT D. WHITE,

By /s/ ERIC A. ROSE,

Attorneys for Appellants Homer E. Gillespie,
Catherine Gillespie, Gillespie Games Company,
a California Corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 20, 1955. [161]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 172, inclusive, contain the original Complaint; Answer; Answer to Counterclaim; Request for Jury; Defendants' Interrogatories to Plaintiff; Request for Admission of Facts; Answer to Defendants' Interrogatories to Plaintiffs; Response to Request to Admission; Motion for Summary Judgment or to Dismiss; Affidavit in Proof of Admission of Facts; Affidavit of Harold A. Ludwig; Affidavit of Victor A. Murray filed Oct. 16, 1954; Affidavit of Basil E. Norris; Affidavit of Coma F. Norris filed Oct. 16, 1954; Affidavit of Ella Striegel; Affidavit of Kenneth J. Martinson;

Affidavit of Homer E. Gillespie and Eric A. Rose; Affidavit of Edward Nagel; Affidavit of Alvin B. Cobble; Stipulation; Affidavit of Bob R. Smits; Affidavit of Victor A. Murray, filed Nov. 15, 1954; Affidavit of Wesley Crowther; Affidavit of Coma F. Norris filed Nov. 15, 1954; Affidavit of John Aldridge; Affidavit of George Cowin; Affidavit of Kay Cowin; Order on Defendants' Motion for Summary Judgment; Findings of Fact and Conclusions of Law; Judgment for Defendants; Notice of Appeal; Statement of Points on Appeal; Designation of Contents of Record on Appeal; which, together with a full, true and correct copy of the Docket Entries herein, and the original Plaintiffs' Exhibits 1, 2 and 3, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court this 28th day of February, 1955.

[Seal]

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No 14674. United States Court of Appeals for the Ninth Circuit. Homer E. Gillespie, Catherine L. Gillespie and Gillespie Games Company, a Corporation, Appellants, vs. Coma F. Norris, Individually and Doing Business as C. F. Norris Manufacturing Company, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 1, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14674

HOMER E. GILLESPIE, CATHERINE L.
GILLESPIE, GILLESPIE GAMES COM-
PANY, a California Corporation,

Appellants,

vs.

COMA F. NORRIS, Individually and Doing Busi-
ness as C. F. NORRIS MANUFACTURING
COMPANY, et al.,

Respondent.

STATEMENT OF POINTS ON APPEAL

Pursuant to the provisions of Rule 17 (6) of the Rules of the United States Court of Appeals for the Ninth Circuit, appellants state the following points upon which they will rely on appeal:

1. The evidence is insufficient to support the findings of fact or judgment.

2. That the Court failed to make findings of fact on material issues.

3. That as a matter of law the Court erred in granting defendants' motion for summary judgment, based upon the affidavits submitted in support of the motion and those filed in opposition

thereto, and upon copies of letters patent No. 2,595,669 in suit, as well as copies of letters patent No. 725,684 issued on April 21, 1903, to Dorsey, and patent No. 2,160,349 issued May 30, 1939, to Andrews.

Appellants hereby designate the following record to be printed:

* * *

Dated this 7th day of March, 1955.

/s/ ERIC A. ROSE,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 8, 1955.

[Title of Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the Appellants and Respondent in the above-entitled action, through their respective attorneys, that Exhibits A, B, and C attached to the Affidavit of Victor A. Murray, dated August 13, 1954, are the same exhibits, with corresponding lettering, attached, respectively, to Defendants' Interrogatories to Plaintiff, and the Affidavits of Ella Striegel, Harold Ludwig and Basil A. Norris, and that such exhibits need not be printed for said last-named affidavits.

Dated this 7th day of March, 1955.

/s/ ERIC A. ROSE,

Attorney for Appellants.

WILLIAM C. BABCOCK and
FREDERICK E. MUELLER,

By /s/ FREDERICK E. MUELLER,

Attorney for Respondent.

Receipt of copy acknowledged.

[Endorsed]: Filed March 8, 1955.

No. 14674

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOMER E. GILLESPIE, CATHERINE L. GILLESPIE and GILLESPIE GAMES COMPANY, a Corporation,

Appellants,

vs.

COMA F. NORRIS, Individually and Doing Business as
C. F. NORRIS MANUFACTURING COMPANY,

Appellee.

APPELLANTS' OPENING BRIEF.

FILED

MAY 21 1955

ERIC A. ROSE,

711 F. & M. Building,
Long Beach 12, California,

Attorney for Appellants.

PAUL P. O'BRIEN, CLERK



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No. 14674
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HOMER E. GILLESPIE, *et al.*,

Appellants,

vs.

COMA F. NORRIS, *etc.*,

Appellee.

APPELLANTS' OPENING BRIEF.

Pleadings and Facts Disclosing Basis of Jurisdiction.

This action was instituted in the United States District Court in and for the Southern District of California, Central Division, entitled Homer E. Gillespie, Catherine L. Gillespie, Gillespie Games Company, a California Corporation, plaintiffs, vs. Coma F. Norris, individually and doing business as C. F. Norris Manufacturing Company, defendants, No. 16858-WM, by way of complaint for infringement of U. S. Letters Patent No. 2,595,669, charging defendants with infringement of said letters patent. After answer was filed, defendants made a motion for summary judgment, and said motion was submitted to the trial court on affidavit and counter-affidavits. The mo-

tion for summary judgment was granted, and judgment was entered adjudging claims No. 1, 2, 3, 11, 12, 13 and 14 of the above named letters patent to be invalid and dismissing the complaint on the merits. [Tr. pp. 73-74.]

Judgment was signed on December 30, 1954, and notice of appeal was filed on behalf of appellants by their attorneys on January 20, 1955 [Tr. pp. 74-75], wherein they appeal to the United States Court of Appeals for the Ninth Circuit, from the above-stated judgment.

The statutory basis for jurisdiction of the District Court is U. S. C., Title 28, Sec. 1338(a), and the statutory basis for the jurisdiction of this Court is U. S. C., Title 28, Sec. 1291 and Sec. 1292(4).

Statement of the Case.

After complaint and answer thereto was filed, defendants moved the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in defendants' favor. The motion was based on certain affidavits to which plaintiffs had filed counter-affidavits which in fact denied all matters stated in the affidavits supporting the motion. [Tr. pp. 39-69.]

The file wrappers of Letters Patent No. 2,595,669 and its parent application, Serial No. 796,523, were offered and received in evidence during the hearing on the motion.

The parties stipulated that the copy of Letters Patent No. 2,595,669 to Gillespie [Tr. Vol. II, pp. 89-98], was true and correct. [Tr. p. 64.]

Defendants claimed, and the Court sustained their contention, that W. E. Andrews Patent No. 2,160,349 [Tr. Vol. II, pp. 82-84], and L. J. Dorsey Patent No. 725,684 [Tr. Vol. II, pp. 86-88], anticipated the patent in suit, and particularly that claims 1, 2, 3, 11, 12, 13 and 14 of said Letters Patent were invalid because not new, totally lacking in invention, and anticipated. The motion for a summary judgment was granted on these grounds, and findings of fact and conclusions of law were filed accordingly. [Tr. pp. 71-72.]

Specification of Errors Relied Upon by Appellants.

1. The evidence is insufficient to support the findings or conclusions particularly as it relates to

- (a) Invention,
- (b) Novelty,
- (c) Anticipation.

2. The Court erred in granting defendants' motion for summary judgment based upon the Dorsey and Andrews patents as anticipatory of the Gillespie patent.

ARGUMENT.

I.

Patent No. 2,595,669 Discloses Invention.

The basic element claimed in the claims involved in the instant action is "a horizontal stationary launching platform disposed a sufficient distance above said playing field and outside of said housing and forming a slit-like opening with said cover so that disc-like playing pieces may be manually trajected from said platform through said slit-like opening and through the air onto said playing field!

The question of invention is a question of fact and not of law.

Wire Tie Machine Company v. Pacific (C. C. A. 9), 102 F. 2d 530;

Crowell v. Baker (C. C. A. 9), 153 F. 2d 972;

Pointer v. Six Wheel (C. C. A. 9), 177 F. 2d 153.

Courts have dealt however with the question of invention as though it were one of law. This conflict can only be explained by breaking the question of patentable invention down into its component parts: what the prior art was and what the patentee did to improve upon it, and then, whether what the patentee did is properly to be classified as an invention. The nature of the prior art, it has been held, and the nature of what the patentee did to improve upon it must always be *questions of fact*. The question of the name to be given to what was done by the patentee, whether it is to be called an invention under the prior art or whether it is not, is a question

fundamentally of the meaning of the words used in the statute. (35 U. S. C., Sec. 31.)

Hanovia v. David Buttrick Co. (C. C. A. 1), 27 F. 2d 888;

Nat. Slug Rejectors v. A. B. T. Manu. Corp. (C. C. A. 7), 164 F. 2d 333.

When there is doubt as to the question of invention, the confirmation arising from the issuance of a patent may avail to resolve the doubt in favor of *its* validity.

Elec. Vacuum Cleaner Co. v. P. A. Geier Co. (C. C. A. 6), F. 2d 221.

The Court is called upon to decide whether reasonable minds may differ upon the question whether the patent in suit involves invention. Because of the restricted scope of a motion for summary judgment, no evidence is before the Court that while the penny pitch game is old, and the relative return is small, the costs of an operator have been the source of many business failures, and *the industry has since its inception been in urgent need of a device which would eliminate the operator and protect the revenue from unauthorized interference.* In spite of the fact that such need was urgent, no one has apparently thought of the idea disclosed by the patent at bar. *The fact that a device or method satisfies an old and recognized want is highly persuasive of invention.*

Levin v. Coe (App. D. C.), 132 F. 2d 589.

A material contribution to a crowded art is indicative of invention.

Robinson v. Hughes (C. C. A. 5), 176 F. 2d 783.

Utility, economy, efficiency, or other advantage, may be evidence of invention.

Pyle Nat. Co. v. Lewin (C. C. A. 7), 92 F. 2d 628.

Satisfaction of long-felt want was held evidence of invention.

Nat. Lock Washer Co. v. Geo. K. Garrett Co. (C. C. A. 3), 98 Fed. 643.

Giving the Andrews and Dorsey patents the effect to which they are legally entitled, it is unquestionably true that the result achieved by the instant patent was neither contemplated nor described in the prior art cited.

One who produces a patentable new result, the simplicity of which effects a saving of time and costs, not suggested by the references, is entitled to a patent.

Application of Ott (C. C. P. A.), 182 F. 2d 209.

Increased efficiency is evidence of invention.

Iron Fireman Mfg. Co. v. Industrial Eng. Corp., (C. C. A. 7), 89 F. 2d 904.

It is respectfully submitted that evidence of the above stated attributes applicable to the instant invention would constitute evidence to be submitted at the trial of the instant action, and such attributes must be decided as questions of fact on which this Court cannot rule by reason of the limited scope of the motion. The evidence would further disclose that after receiving the information published in the patent, the game industry welcomed the new device with open arms, and that the exploitation of the patent was highly successful wherever marketed, and further that defendant attempted to saturate the Southern

California market with devices embodying plaintiffs' invention *after* the device was disclosed to him by plaintiffs.

It is respectfully submitted that for the foregoing reasons and based upon the above stated authorities, the Court erred in ruling that the patent at bar did as a matter of law not disclose invention.

II.

Patent No. 2,595,669 Discloses Novelty.

The trial court in its decision states that plaintiffs' device is not novel.

It has been repeatedly held that in order to negative novelty or, as it is usually expressed, to "anticipate" an invention, it is necessary that all of the elements of the invention or their equivalents be found *in one single* description or structure where they do substantially the same work in substantially the same way.

Imhaeuser v. Buerk (1879), 101 U. S. 647, 660, 25 L. Ed. 945;

Bates v. Coe (1878), 98 U. S. 31, 25 L. Ed. 68.

Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co. (C. C. A. 8), 215 Fed. 362;

Ventilated Cushion & Spring Co. v. D'Arcy (C. C. A. 6, 1916), 232 Fed. 468;

Dow Chem. Co. v. Williams Bros. Well Treating Co. (C. C. A. 10, 1936), 81 F. 2d 495, 501;

Universal Oil Products Co. v. Winkler-Kock E. Co. (D. C., D. Del., 1934), 6 Fed. Supp. 763, 770, *aff'd* 7 F. 2d 991, (C. C. A. 3, 1935.)

A patent relied upon as an anticipation must itself speak. Its specification must give in substance the same

knowledge and the same directions as the specification of the patent in suit.

Southern Phosphate v. Phosphate Recovery (C. C. A. 3), 102 F. 2d 801.

Plaintiffs' device provides a launching platform from which playing pieces are propelled upon the playing surface. The device permits the player to aim and direct the playing piece to the target on the paying surface. At the same time the device prevents tampering with the playing pieces deposited upon the playing surface.

The Andrews patent does not teach any part or portion of the result achieved by plaintiffs' invention. Claim 1 of Andrews specifically provides "*vertical slots of a width for the slidable passage of the tokens and of a length substantially greater than the major dimension of the token, and said board being of a thickness sufficient to prevent deviation of the token from a vertical plane while passing through the slots.*"

The Andrews device is therefore specifically constructed to *prevent* aiming and directing of the tokens. One of the chief purposes of the instant patent is therefore *intentionally* defeated in the Andrews patent.

The Dorsey device provides an elastic "shooting-platform" permitting the player to make "changes in the elevation or the depression of the plane of projection." There is nothing in the specification or claims of this patent which indicates that Dorsey either visualized or intended to provide the device patented by Gillespie.

It is respectfully submitted that in view of the fact that neither Andrews nor Dorsey describe or intimate that they intended to cover the subject matter of the instant

patent, this Court should not speculate on a motion for summary judgment whether a person skilled in the instant art would have arrived at Plaintiffs' construction, particularly in view of the fact that *in spite of the urgency with which the game industry required the solution disclosed in Plaintiffs' patent, Gillespie was the person who 45 years after issuance of the Dorsey patent and 11 years after issuance of the Andrews patent first disclosed this labor saving device to the public.*

This court held in *Payne v. Williams etc. Co.* (C. C. A. 9, 1941), cert. den. 313 U. S. 572, 85 L. Ed. 1530, that prior patents cannot be reconstructed in the light of the invention involved in a patent infringement suit, *and then used as a part of the prior art.* However, that is exactly what the trial court must have done in order to arrive at the statement that Dorsey and Andrews were anticipatory to Gillespie.

Alleged anticipatory patents must stand on their own published disclosures and can be considered as teaching the art *only those things that can be found in them.*

Mead v. Hillman (C. C. A. 7), 135 F. 2d 955;

Dewey v. Mimex (C. C. A. 2), 124 F. 2d 986;

Novelty is a question of fact.

In *B. F. Sturtevant v. Mass. Hair and Felt Co.* (C. C. A. 1), 122 F. 2d 900, cert. den. 315 U. S. 823, 86 L. Ed. 1219, the Court states at page 908:

"The question of priority of invention, even when the attempt is made to invalidate a patent by showing an earlier one rather than by merely showing prior general knowledge and use, is, like the question of patentable invention, one of fact. 1 Walker on Pat-

ents, Deller's Edition sec 61 United States v Esnault-Pelterie, 303 U. S. 26, 30, 31, 58 S. Ct. 412, 82 L. Ed. 625. The reason for this is that '*it is not the construction of the instrument, but the character of the thing invented*, which is sought in questions of identity and diversity of inventions.' Bischoff v. Wethered, 9 Wall. 812, 76 U. S. 812, 816, 19 L. Ed. 829." (Emphasis by the Court.)

The only authority on which the trial court relied, invalidating plaintiffs' claims, in its Order on Defendants' Motion for Summary Judgment is the decision of this Court in *Jacuzzi Bros. v. Berkeley Pump Co.*, 191 F. 2d 632. [Tr. pp. 69-70.]

The last named case was *fully tried*, and the Court decided as a matter of *fact*, and not of *law*, that the claims in issue were invalid. Appellant asked this Court in the last cited case to hold that there was invention as a *matter of law*, which this Court in accordance with the settled law relating to the presumption of the correctness of the findings of the trial court, refused to do. There is absolutely no basis for the assertion by the trial court in the instant case that "no trier of fact could reasonably find that the device described . . . is either new or the result of invention." [Tr. p. 70.]

Judge Learned Hand answered the trial court's statement in *Kirsch etc. Co. v. Gould etc. Co.* (C. C. A. 2), 6 F. 2d 793, 794, better than the writer of this brief could, as follows:

"An invention is a new display of ingenuity beyond the compass of the routineer, and in the end that is

all that can be said about it. Courts cannot avoid the duty of divining as best as they can what the day to day capacity of the ordinary artisan will produce. This they attempt by looking at the history of the art, the occasion for the invention, its success, its independent repetition at about the same time, and the state of the underlying art, which was a condition upon its appearance at all. Yet, when all is said, there will remain cases when we can only fall back upon such good sense as we may have, and in these we cannot help exposing the inventor to the hazard inherent in hypostatizing such modifications in the existing arts as are within the limited imagination of the journeyman. There comes a point when the question must be resolved by a *subjective opinion* as to what seems an easy step and what does not. We must try to correct our standard by such objective references as we can, *but in the end the judgment will appear, and no doubt be, to a large extent personal, and in that sense arbitrary.*"

As has been stated, Novelty as well as patentable invention are questions of fact. Judge Hand's definition, given above, indicates *why* it should be decided as a question of fact.

It is respectfully submitted that the trial court erred in making the issues presented by the pleadings from the jury and deciding *all* issues as a matter of law.

The key elements listed by Judge Hand, namely (1) History of the Art; (2) Occasion of the Invention; (3) Its success; (4) Its independent repetition at about the same time; (5) the State of the underlying art, which was a condition upon its appearance at all; all of these

questions were quite obviously not considered for the reason that the Court had no evidence before it to support an opinion on it.

For the foregoing reasons, and based upon the above cited authorities, it is therefore respectfully submitted that the judgment should be reversed.

Respectfully submitted,

ERIC A. ROSE,

Attorney for Appellants.

No. 14674.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOMER E. GILLESPIE, CATHERINE L. GILLESPIE and
GILLESPIE GAMES COMPANY, a Corporation,
Appellants,

vs.

COMA F. NORRIS, Individually and Doing Business as
C. F. NORRIS MANUFACTURING COMPANY,
Appellee.

APPELLEE'S BRIEF.

WILLIAM C. BABCOCK,
FREDERICK E. MUELLER,
1203 Heartwell Building,
Long Beach 2, California,
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FILED

JUN 23 1955

PAUL P. O'BRIEN, CLERK



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No. 14674.

IN THE

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HOMER E. GILLEPSIE, CATHERINE L. GILLESPIE and
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Appellants,

vs.

COMA F. NORRIS, Individually and Doing Business as
C. F. NORRIS MANUFACTURING COMPANY,
Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

This appeal by plaintiffs is from a final judgment of the United States District Court for the Southern District of California, Central Division, dismissing on the merits plaintiffs-appellants' complaint for patent infringement. The District Court had jurisdiction of the action under 28 U. S. C. 1338(a) and the judgment being final, this Court has jurisdiction under 28 U. S. C. 1291.

Statement of the Case.

Plaintiffs-appellants' suit is for alleged infringement of Claims 1-3, 11-14 of their patent No. 2,595,669 for a Disk Game Apparatus.

The claims in suit define a device in which disk-like playing pieces are manually propelled from an elevated launching platform onto a playing field that has targets thereon, which device also includes a rotary sweep by which the playing field may be periodically cleared of accumulated playing pieces.

In Claims 1-3 of the plaintiffs' patent the alleged invention is defined as a combination of elements comprising the entire game, while Claims 11-14 define the horizontal disk launching platform without the sweep means.

After issue was joined on pleadings in the District Court, the defendant made a motion for summary judgment urging that the Gillespie patent was not infringed inasmuch as the patent was invalid for the following reasons:

- (a) The subject matter defined by Claims 1-3 and 11-14 was not novel and not the result of invention, and
- (b) The subject matter defined by Claims 1-3 and 11-14 had been in public use for more than one year prior to the filing date of the application from which the Gillespie patent No. 2,595,669 matured.

The defendant based his contention that the subject matter of Claims 1-3 and 11-14 was neither novel nor

the result of invention on the disclosures made in United States Letters Patents No. 725,684 issued to Dorsey in 1903 and No. 2,160,349 issued to Andrews in 1939. The plaintiff has admitted that neither of these two prior art patents were considered by the United States Patent Office during the prosecution of the Gillespie application that resulted in said patent in suit.

Numerous affidavits and counter-affidavits were filed by defendant and plaintiffs relative to the question of prior public use of the Gillespie device.

The defendant's motion for summary judgment was argued and submitted for decision to the District Court which found that in view of the prior Dorsey and Andrews patents, the claims in suit of plaintiffs' patent were neither new nor the result of invention and therefor concluded that these claims were invalid. In view of the complete disclosures found in the Dorsey and Andrews patents of all potentially novel subject matter of the Gillespie device, the Court based its findings of fact and conclusions of law thereon, and made no findings of fact relative to the prior use of devices embodying the alleged novel subject matter shown and claimed in the Gillespie patent.

Although the trial court made no findings of fact on the issue of prior public use of devices embodying the alleged novel subject matter comprising the Gillespie device, plaintiffs saw fit in their statement of points on appeal to state that the Court was in error to grant

defendant's motion for summary judgment based upon affidavits. Plaintiffs further belabored this contention by designating many of these affidavits for printing in the record.

Summary of Argument.

A. The District Court was correct in granting defendant's motion for summary judgment when the basis therefor was determined solely on the disclosures found in the Dorsey and Andrew patents which were not considered or cited by the Patent Office during the prosecution of the Gillespie patent No. 2,595,669.

B. The Dorsey and Andrews patents are sufficient evidence of themselves to support the findings and conclusions of the District Court that the claims in suit define subject matter that is anticipated by disclosures made in these patents, and that the Gillespie claims in suit are invalid for lack of novelty and invention.

Argument A.

The District Court Was Correct in Granting Defendant's Motion for Summary Judgment When the Basis Therefor Was Determined Solely on the Disclosures Found in the Dorsey and Andrew Patents Which Were Not Considered or Cited by the Patent Office During the Prosecution of the Gillespie Patent No. 2,595,669.

Appellants open their brief on page 1 thereof with the misleading statement, to-wit: "After answer was filed, defendants made a motion for summary judgment, and said motion was submitted to the trial court on affidavit and counter-affidavits. The motion for summary judgment was granted, . . ."

The statement above quoted does not give this Court a true picture of what occurred in the trial court, as appellants have seen fit to withhold the fact that the motion for summary judgment was also supported by disclosures made in the W. E. Andrews patent No. 2,160,349 [Tr. Vol. II, pp. 82-84] and the L. J. Dorsey patent No. 725,684 [Tr. Vol II, pp. 86-88].

Appellants have also withheld from this Court the damaging fact that the District Court's findings of fact and conclusions of law [Tr. Vol. I, pp. 71-72] are based solely on the disclosures found in the Dorsey and Andrews patents, and not on affidavits or counter-affidavits.

The Andrews patent [Tr. Vol. II, pp. 82-84] describes and claims a game having a horizontal playing field on which targets are defined, and having side wall enclosures

extending upwardly from the edges of the field. The Andrews device also includes means for removing playing disks from the field, as well as a cover that has a number of spaced, vertically disposed slits formed therein through which a player can traject disks onto the playing field in an effort to secure a winning score.

The alleged invention broadly comprises a combination of the following elements:

1. A horizontal playing field having targets thereon,
2. An enclosure extending upwardly from the outer edge of said playing field and supporting a horizontal playing piece launching platform at an elevated position thereabove,
3. A transparent cover disposed above said enclosure that defines a slit-like aperture relative to said launching platform through which disks may be trajected through the air onto the playing field, and
4. Means to sweep or displace disks from the playing field.

The operation of the Andrews device and appellants' alleged invention are identical, for in both, the player attempts to traject disk-like playing pieces onto a playing field to secure a winning score, and both devices are provided with means to remove the playing pieces from the playing field.

Appellants' device performs exactly the same function as the Andrews' invention, and differs therefrom only in the fact that the Gillespie device has an elongate hori-

zontal slit through which the playing pieces can be trajected rather than a number of vertically disposed slits. In addition, the Gillespie device includes a horizontal platform on which the playing pieces rest prior to being trajected through his elongate slit.

Dorsey discloses a game that comprises a playing field on which targets are defined, enclosures extending upwardly from the edges of the playing field, and an elevated platform on which disk-like playing pieces are disposed prior to trajection thereof onto the playing surface. Like that of Andrews, the Dorsey invention performs exactly the same function as appellants' device.

Therefore, in view of the Andrews and Dorsey patent disclosures, the only question before the District Court was whether it amounted to invention for Gillespie to rotate the vertical coin-receiving slits of Andrews 90° in order to provide the elongate horizontally positioned slit through which disk-like playing pieces could be trajected, as well as to provide a platform on which the playing pieces could be rested before being so trajected.

The District Court found that in view of the Andrews and Dorsey patent disclosures, the Gillespie device as defined in Claims 1-3 and 11-14 thereof was not novel and did not amount to invention.

Appellants contend that it was error for the District Court to so find, and in support of this contention, point out on page 8 of their brief that the Andrews slits prevent aiming of the disk-like playing pieces. This con-

tention cannot be taken seriously, inasmuch as with the Andrews device, aiming of the playing piece is accomplished by choosing a particular one of the large number of slits available from which the playing piece may be discharged there through. In using appellants' device, the playing piece is simply moved longitudinally along an elongate slit until a desired location is found from which the playing piece is to be trajected.

Thus, whether a player uses either the Andrews invention or appellants' device, before trajecting the disk onto the playing surface he must make a choice. When using the Andrews invention the player selects a particular slit, and when using appellants' device, a particular location on an elongate slit must be selected. It will be apparent that in either case, aiming of the playing piece toward a particular location on the playing field is possible.

Appellants also contend that Gillespie's use of a platform amounts to invention, particularly in view of an alleged need for such a game incorporating same by the game industry. Here again, appellants' contention cannot be taken seriously, for when Gillespie decided to provide a game incorporating horizontal slits, it must have been obvious that a shelf or platform would be convenient for use therewith. This concept of using a platform from which playing pieces can be trajected is clearly shown in the Dorsey patent.

Appellants also contend that the District Court erred in taking the issues presented by the pleadings from a

jury. The recognized function of a jury is to find facts. The facts before the District Court that invalidated the claims in suit were the disclosures made in the Dorsey and Andrews patents, and there was no issue between the parties as to the contents of these patents. Therefore, there obviously was no error made in not having a jury decide the issue presented to the District Court.

Although when a United States patent is granted it is presumed to be valid, this presumption of validity may be overthrown by a single patent which was not considered by the Patent Office. In *Jacuzzi Bros., Inc. v. Berkeley Pump Co.*, 91 U. S. P. Q. 27 (C. C. A. 9, 1951), this court stated,

“But further, a great many of the patents, which were brought to light in this lawsuit and considered by the Trial Court, had not been previously considered by the Patent Office. Even one prior art reference, which has not been considered by the Patent Office, may overthrow the presumption of validity, and, when the most pertinent art has not been brought to the attention of the administrative body, the presumption is largely dissipated. Such is the case here.”

Such is also the case in the present instance by reason of the argument above given.

Argument B.

The Dorsey and Andrews Patents Are Sufficient Evidence of Themselves to Support the Findings and Conclusions of the District Court That the Claims in Suit Define Subject Matter That Is Anticipated by Disclosures Made in These Patents, and the Gillespie Claims in Suit Are Invalid for Lack of Novelty and Invention.

In the first point of appellants' argument they have not challenged a single finding of fact, but instead have discussed at some length what constitutes invention, and have urged the merits of Gillespie's alleged invention in light thereof.

The mere fact that the losing party is unhappy with the judgment of the District Court (as is always the case) does not of itself require the Appellate Court to re-try the case. Appellants must show an appealable error. This appellants have failed to do.

"It is the appellant's duty to bring up a record that discloses error. Every intendment should be in favor of the lower court's judgment." (*Hardt v. Kirkpatrick*, 91 F. 2d 875, 878 (C. A. 9, 1937).)

"The burden of showing grounds on which a judgment should be reversed rests on the appellant, *Elias v. Clarke*, 2 Cir., 143 F. 2d 640, certiorari denied, 323 U. S. 778, 65 S. Ct. 191, 89 L. Ed. 622. . . ." (*Danaher v. United States*, 184 F. 2d 673, 675 (C. A. 8, 1950).)

The findings of the District Court in the present instance are based solely on the contents of the Andrews and Dorsey patents. Such findings were sufficient to

invalidate the claims in suit. Therefore, appellants' contention that they should have the right to introduce additional evidence as to the operation of Gillespie's alleged invention, the need in the game industry for such a device, the commercial success of the Gillespie device, and acts of the appellants is without merit, for this evidence would simply augment the Andrews and Dorsey patent disclosures, which disclosures alone invalidate the claims in suit.

Inasmuch as appellants have failed to challenge a single finding, the decision of the District Court should be affirmed.

In *Jacuzzi Bros., Inc. v. Berkeley Pump Co.*, 91 U. S. P. Q. 29 (C. C. A. 9, 1951), this court stated,

'If the findings were based wholly on written documents without expert interpretation, the Trial Judge must find the facts and it is not true that we are in as good a position to find the facts from the written documents as he was. Furthermore, the law does not commit the function to us, but solely the power to reverse if his findings be clearly erroneous. Rule 52, Federal Rules of Procedure.'

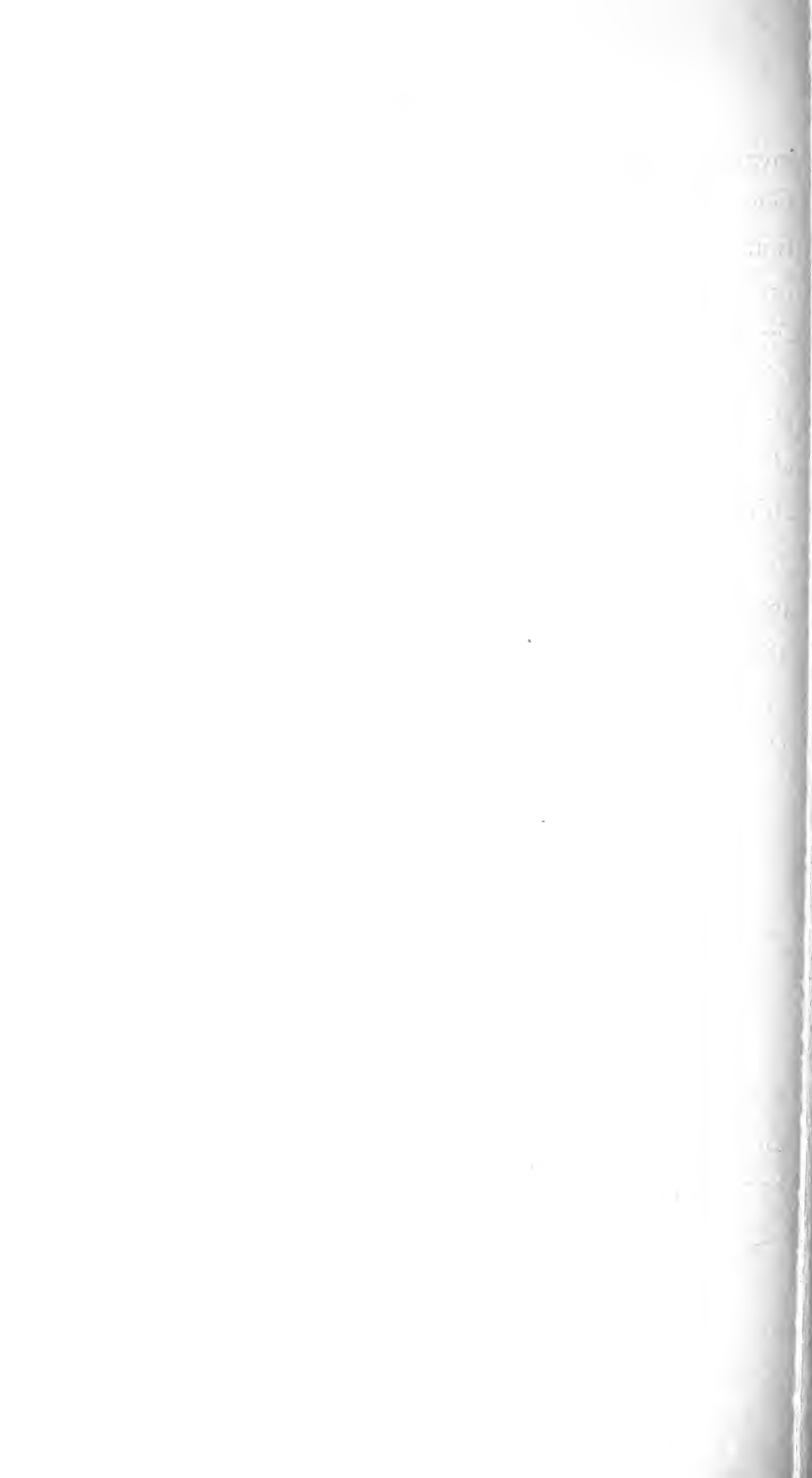
In view of the foregoing reasons, and based upon cited authorities, it is respectfully requested that the judgment be affirmed.

Respectfully submitted,

WILLIAM C. BABCOCK,

FREDERICK E. MUELLER,

Attorneys for Defendant-Appellee.



No. 14674

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HOMER E. GILLESPIE, CATHERINE L. GILLESPIE AND
GILLESPIE GAMES COMPANY, a Corporation,
Appellants,

vs.

COMA F. NORRIS, Individually and Doing Business as
C. F. NORRIS MANUFACTURING COMPANY,
Appellee.

APPELLANTS' CLOSING BRIEF.

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FILED

JUL 22 1955

PAUL P. O'BRIEN, CLERK

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PA

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Appellee.

APPELLANTS' CLOSING BRIEF.

I.

Answer to Appellee's Argument That the Basis for the Motion for Summary Judgment Was Determined Solely on the Disclosures Found in the Dorsey and Andrews Patents.

Appellee's argument in attempting to justify the trial court's decision in granting the motion for summary judgment as based *solely* on the disclosures found in the Dorsey and Andrews patents, fails to state the very elements which made this device acceptable to the game industry and which were responsible for the failure of the Andrews and Dorsey patents to succeed.

In his statement of the *elements* of the claims in dispute, Appellee on page 6 of his brief fails to take into account the following elements disclosed in the Gillespie Patent, namely:

Claim 13:

“Enclosure means . . . , including walls and a transparent cover supported by supporting means slightly above the top edge of the walls and forming a slit-like opening with said walls; and a horizontal stationary launching platform completely surrounding the enclosure means and disposed above the playing field adjacent to said slit-like opening and outside of the enclosure means”

Claim 12:

“Enclosure means . . . including a cover and supporting means for said cover, said supporting means being provided with slit-like apertures *below said cover* adapted for the transfer therethrough of the playing pieces; . . . a substantially horizontal stationary platform disposed adjacent said slit-like apertures in the cover *supporting means* and outside of said enclosure,”

Claim 11:

“. . . a substantially horizontal stationary platform disposed outside of said enclosure adjacent said playing field at a sufficient distance thereabove and forming a slit-like opening *with the enclosure means*. . . .”

Claim 3:

“. . . a horizontal stationary launching platform disposed a sufficient distance above said playing field outside of said housing and forming a slit-like opening with said *cover*. . . . ; means for displacing

the playing pieces from the playing field at the conclusion of a game; said displacing means including a horizontally disposed sweep means operatively attached to a shaft extending through said playing field and extending completely over the horizontal playing field; and means for turning said shaft to rotate said sweep.”

Claim 2:

“. . . ; a horizontal stationary launching platform disposed a sufficient distance above said playing field and outside of said housing and forming a slit-like opening with said cover, so that disc-like playing pieces manually trajected from said platform through said slit-like opening and through the air into said playing field; and horizontally disposed sweep means extending completely over the horizontal playing field for removing the playing pieces from the playing field at the conclusion of a game.”

Claim 1:

“. . . ; a horizontal stationary launching platform disposed a sufficient distance above said playing field and outside of said housing and forming a slit-like opening with said cover so that disc-like playing pieces may be trajected from said platform through the slit-like opening and through the air on to said playing field; and means for displacing the playing pieces from the playing field at the conclusion of a game.” (Emphasis added.)

None of the above stated elements can be found either in the Andrews patent or in the Dorsey patent disclosures.

The above stated elements are the material elements which made plaintiffs' invention the commercial success referred to in Appellants' Opening Brief.

It is respectfully submitted that the instant invention was not *anticipated* by the two patents which allegedly form the *sole* basis for the Court's decision, because under the settled law applicable to "anticipation" all of the elements of the invention or their equivalent must be found in *one single description* or structure where they do substantially the same work in substantially the same way.

Imhaeuser v. Buerk, 101 U. S. 647, 660 (1879),
25 L. Ed. 945;

Bates v. Coe, 98 U. S. 31 (1878), 25 L. Ed. 68;

*Ottumwa Box Car Loader Co. v. Christy Box Car
Loader Co.* (C. C. A. 8), 215 Fed. 362;

Ventilated Cushion & Spring Co. v. D'Arcy (C. C.
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*Dow Chem. Co. v. Williams Bros. Well Treating
Co.* (C. C. A. 10, 1936), 81 F. 2d 495, 501;

Universal Oil Products Co. v. Winkler-Kock E. Co.
(D. C., D. Del., 1934), 6 Fed. Supp. 763, 770,
aff'd 7 F. 2d 991 (C. C. A. 3, 1935).

The two cited patents utterly fail in the test if applied to defendant's claim of "anticipation."

Contrary to defendant's claim on pages 6 and 7 of his brief neither the operation nor the function of the cited patents is identical with the instant patent.

The player, using the Andrews' invention *cannot aim* the playing piece and, as stated in Appellants' Opening Brief, the *aiming* of the coins was purposely and intentionally avoided by making the vertical slots so narrow as to permit only a mere *dropping* of the playing piece, and the coin cannot be trajected onto the playing field, the line

of drop of the playing piece in the Andrews patent being a straight line vertical *drop* rather than a *trajectory*.

The instant patent, therefore, with the elements disclosed in the claims thereof, accomplishes a dual function by not only making the playing field inaccessible to the player, but by permitting the player to aim the playing piece through the slit-like opening formed by the *cover supporting means between the cover and the enclosure* onto the very spot which he has selected as the target on the playing surface. The player of the Andrews device has no control over the direction of the playing piece which is vertical, and vertical only.

Concerning the horizontal stationary launching platform never before disclosed in any patent application, as far as either plaintiff, defendant, or the patent office could discover, Appellee states on page 8 of his brief that "when Gillespie decided to provide a claim incorporating horizontal slits, it must have been obvious that a shelf or platform would be convenient for use therewith."

It is respectfully submitted that the fact that Gillespie was the person who 45 years after issuance of the Dorsey patent and 11 years after the issuance of the Andrews patent first discovered this device, and was able to make a commercial success with it, militates against Appellee's contention that the disclosures by Dorsey or Andrews as leading to the horizontal stationary launching platform, were "obvious."

Appellee is not assisted by any part or portion of the holding of this Court in *Jacuzzi Bros., Inc. v. Berkley Pump Co.* concerning the statement by this Court that "even one prior art reference which has not been considered by the patent office may overthrow the presumption of validity," because if validity is a *question of fact*

than, a trial court may, as the trier of facts, *upon a trial of the case*, make a determination of “anticipation,” provided that the prior art reference *meets* the test of “anticipation.”

It is, therefore, respectfully submitted that the ruling of the Court in granting defendant’s motion for summary judgment *based solely* upon Andrews and Dorsey is against the settled law applicable to the instant case.

II.

Answer to Defendant’s Argument That the Dorsey and Andrews Patents Are Sufficient Evidence of Themselves to Support the Findings and Conclusions of the Trial Court.

Contrary to Appellee’s contention, it is the settled law relating to motions for summary judgment that a summary judgment presupposes that there are no triable issues of fact and accordingly findings of fact and conclusions of law *are not required*. (*Lindsey v. Leavy* (C. C. A. 9th, 1945), 149 F. 2d 899, cert. den. 66 S. Ct. 331, 326 U. S. 783, 90 L. Ed. 474; *Filson v. Fountain* (App. D. C. 1948), 171 F. 2d 999.)

Where a timely appeal is taken from an appealable order granting summary judgment, the Appellate Court must determine whether there is any genuine issue of material fact underlying the adjudication, and, if not, whether the substantive law was correctly applied.

Koepke v. Fontecchio (C. C. A. 9th, 1949), 177 F. 2d 125.

Under the principles applicable to summary judgment the trial court *must* resolve all reasonable doubts concerning the existence of a genuine issue as to a material fact

against the moving party; and a judgment granted in violation of those principles is subject to reversal by the Appellate Court.

Lane Bryant v. Maternity Lane Ltd. (C. C. A. 9th, 1949,) 173 F. 2d 559, 565;

Pacific American Fisheries v. Mullaney (C. C. A. 9th, 1951), 191 F. 2d 137.

Appellee's statement on page 11 of his brief that "Appellants have failed to challenge a single finding," overlooks the issues raised by this Appeal, and the arguments in support thereof.

Appellants' statement of the commercial success of the Gillespie patent and its universal acceptance by the game industry, as well as Appellants' contention that defendant copied Appellants' invention *after* its disclosure by plaintiffs to defendant remains unchallenged except for Appellee's statement on page 11 of his brief that "this evidence would simply augment the Andrews and Dorsey patent disclosures."

These issues, the existence of which Appellee admits, are genuine issues of material fact which should have been submitted to a jury.

For the foregoing reasons, it is respectfully submitted that the judgment should be reversed.

Respectfully submitted,

ERIC A. ROSE,

Attorney for Appellants.

No. 14690

**United States
Court of Appeals
for the Ninth Circuit**

GEORGE A. SHAHEEN,

Appellant,

vs.

GOVERNMENT OF GUAM,

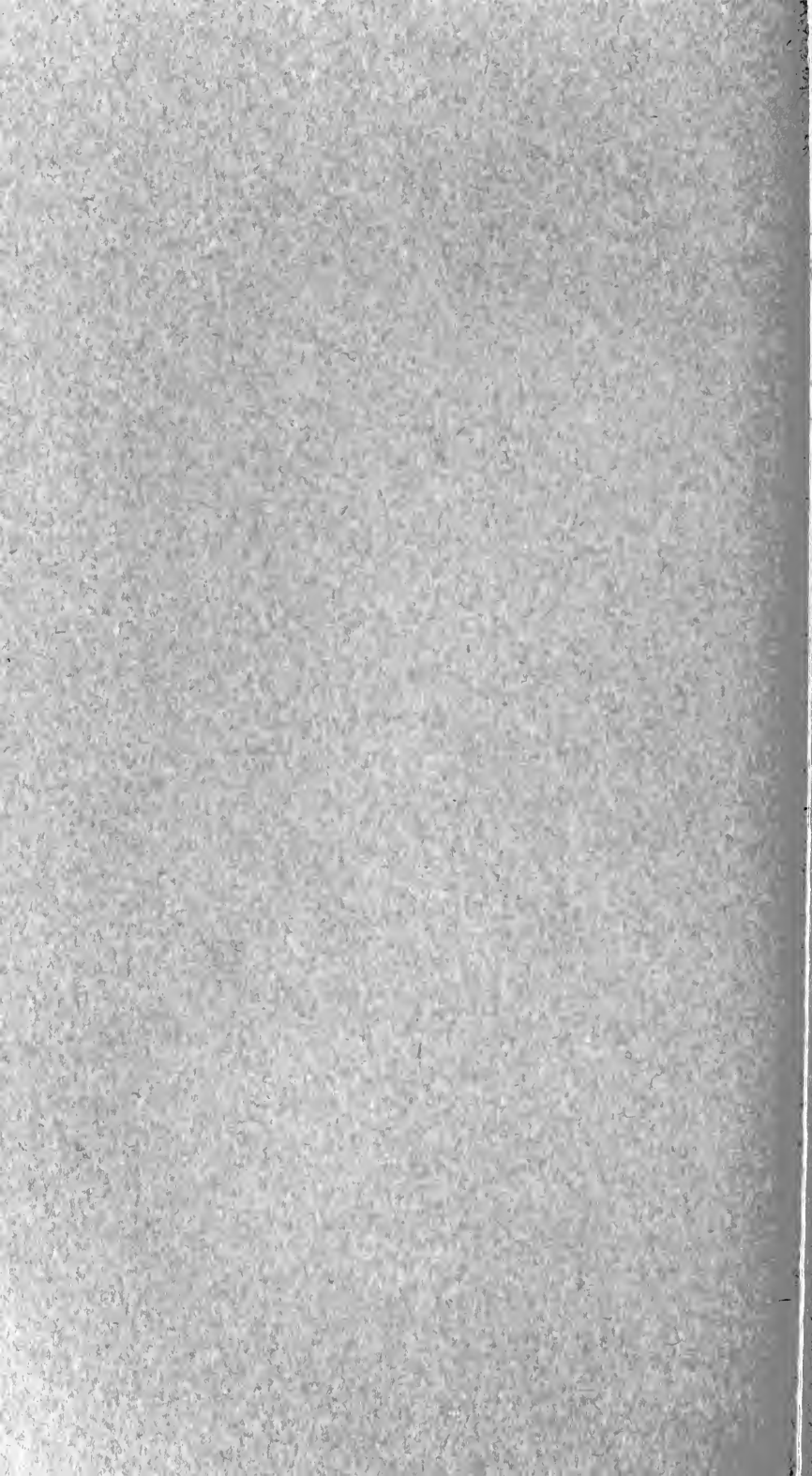
Appellee.

Transcript of Record

**Appeal from the District Court of Guam,
Territory of Guam.**

FILED

MAY -2 1955



No. 14690

**United States
Court of Appeals
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Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

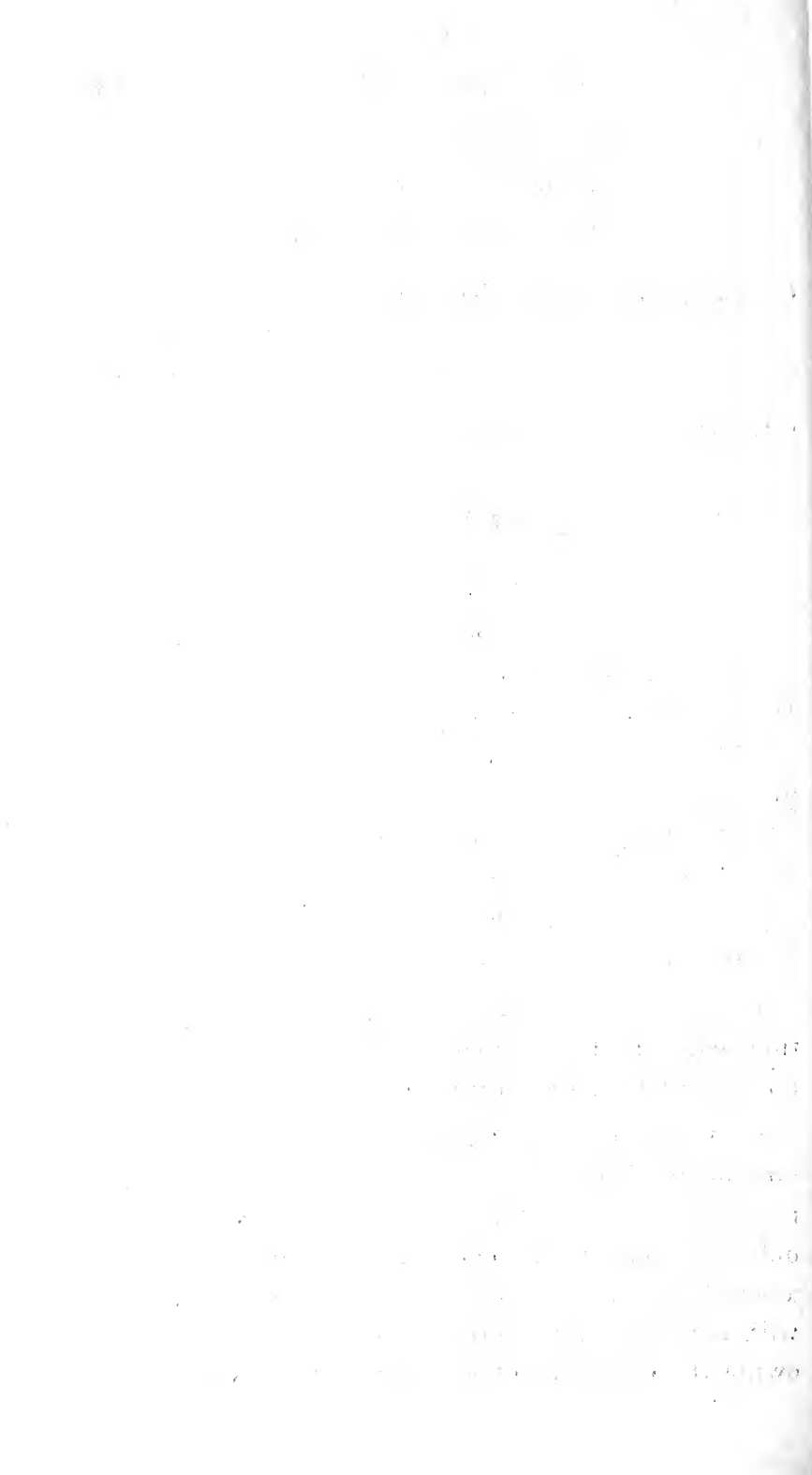
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In the District Court of Guam
for the Territory of Guam

Civil Action No. 73-54

GOVERNMENT OF GUAM,

Plaintiff,

vs.

GEORGE A. SHAHEEN,

Defendant.

COMPLAINT

Count One

1. This is an action involving a tax claim in excess of \$2,000.00 due the Government of Guam. It is brought pursuant to the provisions of Chapter 8A, Title 48, U.S.C. It is authorized by the Commissioner of Revenue and Taxation, Department of Finance, Government of Guam, and directed by the Attorney General, Government of Guam.

2. Defendant has been doing business in Guam during the years 1947 to 1954, inclusive.

3. Defendant has never filed any income tax return with the Government of Guam, nor paid any income tax to the Government of Guam.

4. Under date of November 23, 1954, the Commissioner of Revenue and Taxation caused commissioner's income tax returns to be prepared for defendant and made jeopardy assessments for the amount of income taxes shown thereon, together with penalties and interest, which sums are due and owing the Government of Guam, as follows:

Calendar Year 1951

Amount of Income	\$35,000.00
Amount of Tax	15,640.00
50% Fraud Penalty	7,820.00
Interest to November 23, 1954	2,346.00

Total Jeopardy Assessment\$25,806.00

Calendar Year 1952

Amount of Income	\$35,000.00
Amount of Tax	16,968.00
50% Fraud Penalty	8,484.00
Interest to November 23, 1954	1,696.80

Total Jeopardy Assessment\$27,148.80

Calendar Year 1953

Amount of Income	\$35,000.00
Amount of Tax	16,968.00
50% Fraud Penalty	8,484.00
Interest to November 23, 1954	678.66

Total Jeopardy Assessment\$26,130.66

Calendar Year 1954

Amount of Income	\$15,000.00
Amount of Tax	4,002.00
50% Fraud Penalty	2,001.00
Interest to November 23, 1954	325.17

Total Jeopardy Assessment\$ 6,328.17

Total Jeopardy Assessments, 1951-1954 \$85,413.63

Count Two

1. The Government of Guam realleges paragraphs 1 and 2 of Count One as if set forth in full herein.

2. Defendant has never filed any Business Privilege Tax return, or paid any Business Privilege Tax, as required by Bill No. 3, Eighth Guam Congress, approved effective as law November 12, 1947, which law, as amended, was subsequently re-enacted and codified in Public Law 88, First Guam Legislature, 1952 Second Special Session, effective November 29, 1952, as Chapter 6, Title XX, of the Government Code of Guam.

3. On November 22, 1954, the Commissioner of Revenue and Taxation, Department of Finance, Government of Guam, caused commissioner's returns to be filed for the defendant as follows:

Calender Year	Gross Receipts	Tax
1951	\$35,000.00	\$ 700.00
1952	35,000.00	700.00
1953—January to July ...	20,416.69	408.33
		<hr/>
		\$1,808.33

4. There is due and owing the Government of Guam for such tax the sum of \$1,808.33.

Count Three

1. The Government of Guam realleges paragraphs 1 and 2 of Count One as if set forth in full herein.

2. Defendant has never filed any Business Privilege Tax return, or paid any Business Privilege Tax, as required by Public Law 43, Second Guam Legislature, approved and effective as law July 22, 1953, and codified as Chapter 6, Title XX, of the Government Code of Guam.

3. On November 23, 1954, the Commissioner of Revenue and Taxation, Department of Finance, Government of Guam, caused commissioner's returns to be prepared for the defendant as follows:

Aug.-Dec., 1953

Gross Receipts	\$14,583.35
Tax	291.67
Penalty	35.00
50% Penalty	145.85
Interest to Date	17.65

Total Liability\$490.17

Jan.-Apr., 1954

Gross Receipts	\$10,000.00
Tax	200.00
Penalty	20.00
50% Penalty	100.00
Interest to Date	10.53

Total Liability\$330.53

\$820.70

4. There is due and owing the Government of Guam for such tax the sum of \$820.70.

Wherefore, the Government of Guam prays as follows:

1. That judgment be entered in favor of the Government of Guam in the sum of \$85,413.63 under Count One.

2. That judgment be entered in favor of the Government of Guam in the sum of \$1,808.33 under Count Two.

3. That judgment be entered in favor of the Government of Guam in the sum of \$820.70 under Count Three.

4. That such other relief be granted as may be warranted in the premises.

November 23, 1954.

/s/ HOWARD D. PORTER,
Attorney General;

/s/ LOUIS A. OTTO, JR.,
Deputy Attorney General;

/s/ LEON D. FLORES,
Island Attorney;

/s/ RICHARD ROSENBERRY,
Deputy Island Attorney, Attorneys for Government
of Guam; Government of Guam, Agana, Guam.

[Endorsed]: Filed November 23, 1954.

[Title of District Court and Cause.]

APPOINTMENT—SPECIAL
PROCESS SERVER

Whereas the attorneys for the plaintiff in the within case have requested that Gregorio S. Babauta be specially appointed to serve process, and

Whereas the above-named Gregorio S. Babauta has been found by me to be over the age of eighteen years of age and in all respects is a proper person of suitable discretion and well qualified to serve summons and complaints,

Now, Therefore, It Is Herewith Ordered that the said Gregorio S. Babauta be, and he hereby is, appointed a Special Process Server of summons and complaint in the within-captioned case, to be served in such manner as prescribed by Statute. The said Gregorio S. Babauta shall serve without fee or compensation from the District Court of Guam, and all his official acts, legally performed while acting as a special process server, are entitled to full faith and credence.

Dated this 23rd day of November, 1954, at Agana, Guam.

ROLAND A. GILLETTE,
Clerk of the Court;

[Seal] By /s/ J. A. CRISOSTOMO,
Deputy Clerk, District
Court of Guam.

[Endorsed]: Filed November 23, 1954.

[Title of District Court and Cause.]

MOTION

Now comes the plaintiff, Government of Guam, by its attorneys, Howard D. Porter, Leon D. Flores, Louis A. Otto, Jr., and Richard Rosenberry, and moves the court as follows:

1. For an order, pursuant to Rule 26 of the Federal Rules of Civil Procedure, granting the Plaintiff leave to take the oral deposition of George A. Shaheen, defendant, who has knowledge of the facts, files, writings, books, papers and documents pertaining to transactions between certain businesses on the Territory of Guam and the defendant.

The depositions are for use at the trial of the above-entitled action for the purposes of discovery of evidence to support the plaintiff's allegations and to aid the plaintiff in preparation and presentation of its case.

November 23, 1954.

/s/ HOWARD D. PORTER,
Attorney General;

/s/ LOUIS A. OTTO, JR.,
Deputy Attorney General;

/s/ LEON D. FLORES,
Island Attorney;

/s/ RICHARD ROSENBERRY,
Deputy Island Attorney, Office of Attorney General,
Government of Guam, Agana, Guam.

[Endorsed]: Filed November 23, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION

Harry L. Mangerich, being first duly sworn, states as follows:

1. The documents mentioned in the foregoing motion are all business records of the defendant and presumably in his possession and control.

2. Such documents have reference to business transactions of the defendant, and should show the extent of his business operations on Guam, his gross income, and other matters relevant to the tax liability of the defendant as alleged in the complaint.

/s/ HARRY L. MANGERICH.

Sworn to and subscribed before me this 23rd day of November, 1954.

[Seal] /s/ J. A. CRISOSTOMO,
Deputy Clerk, District
Court of Guam.

[Endorsed]: Filed November 23, 1954.

[Title of District Court and Cause.]

ORDER

On this 23rd day of November, 1954, upon the ex parte application of the plaintiff, Government of Guam, to take the oral deposition of George A. Shaheen, defendant, and the court being fully ad-

vised, and being of the opinion that there is urgent necessity for the taking of the deposition, it is

Ordered that the oral deposition of George A. Shaheen may be taken by plaintiff.

Dated: November 23, 1954.

/s/ PAUL D. SHRIVER,
Judge, District Court
of Guam.

[Endorsed]: Filed November 23, 1954.

[Title of District Court and Cause.]

NOTICE OF TAKING DEPOSITION

To George A. Shaheen, Agana, Guam:

Please take notice that the plaintiff, Government of Guam, will take the testimony, on oral examination of George A. Shaheen, before V. A. Zafra, Chief Commissioner, a Notary Public in and for the Territory of Guam, on the 30th day of November, 1954, at 9:00 a.m., and thereafter from day to day as the taking of the deposition may be adjourned, at the office of said Chief Commissioner, at Agana, Guam.

The testimony of said witness will be taken pursuant to the order of court entered the 23rd day of

November, 1954, a copy of which is hereto attached and is herewith served upon you.

/s/ HOWARD D. PORTER,
Attorney General;

/s/ LOUIS A. OTTO, JR.,
Deputy Attorney General;

/s/ LEON D. FLORES,
Island Attorney;

/s/ RICHARD ROSENBERRY,
Deputy Island Attorney, Attorneys for the Govern-
ment of Guam; Government of Guam, Agana,
Guam.

[Endorsed]: Filed November 23, 1954.

[Title of District Court and Cause.]

MOTION FOR PRODUCTION, INSPECTION AND COPYING OF DOCUMENTS

The Government of Guam moves the court for an order requiring defendant to produce and to permit the plaintiff to inspect and to copy each of the following documents:

1. All books, records and other financial data relating to defendant's operating, conducting and doing business on Guam, M. I., for the period January 1, 1947, to and including November 23, 1954.

2. All contracts, franchises or agreements relating to defendant's operating, conducting and doing

business on Guam, M. I., for the period January 1, 1947, to and including November 23, 1954.

3. All copies of Federal Income Tax Returns filed with the United States Treasury for the years 1947, 1948, 1949, 1950, 1951, 1952 and 1953.

4. All Territory of Hawaii Gross Income Tax returns reflecting gross sales as filed with the Territory of Hawaii for all periods applicable between January 1, 1947, and November 23, 1954.

The defendant has the possession, custody, or control of the foregoing documents. Each of them constitutes or contains evidence relevant and material to a matter involved in this action as shown in Exhibit A hereto attached.

November 23, 1954.

/s/ HOWARD D. PORTER,
Attorney General;

/s/ LOUIS A. OTTO, JR.,
Deputy Attorney General;

/s/ LEON D. FLORES,
Island Attorney;

/s/ RICHARD ROSENBERRY,
Deputy Island Attorney, Attorneys for Government
of Guam; Government of Guam, Agana, Guam.

[Endorsed]: Filed November 23, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION

To George A. Shaheen:

Please take notice that the undersigned will bring the above motion on for hearing before this court, in the courtroom, Legislative Building, on December 3, 1954, at 9:30 a.m., or as soon thereafter as counsel can be heard.

November 23, 1954.

/s/ HOWARD D. PORTER,
Attorney General;

/s/ LOUIS A. OTTO, JR.,
Deputy Attorney General;

/s/ LEON D. FLORES,
Island Attorney;

/s/ RICHARD ROSENBERRY,
Deputy Island Attorney, Attorneys for Government
of Guam; Government of Guam, Agana, Guam.

[Endorsed]: Filed November 23, 1954.

[Title of District Court and Cause.]

SUMMONS

To the Above-Named Defendant, George A. Shaheen:

You are hereby summoned and required to serve upon Leon D. Flores, Island Attorney, plaintiff's attorney, whose address is Office of the Attorney General, Administration Building, Agana, Guam,

an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: November 23, 1954.

[Seal] /s/ ROLAND A. GILLETTE,
Clerk of Court.

Affidavit of Service attached.

[Endorsed]: Filed November 24, 1954.

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendant, George A. Shaheen, appearing specially for the purpose of this motion, objects to the jurisdiction of the court and moves the court to vacate and set aside the return of service issued by the plaintiff herein and served upon this defendant on the 23rd day of November, 1954, for the following reasons:

1. The defendant is a citizen and resident of the Territory of Hawaii, residing in the City of Honolulu, whose address is P. O. Box 3235 in said City, and is neither a resident of the unincorporated territory of Guam or conducting a business therein.

2. That the said defendant, George A. Shaheen, was in Guam from the 14th day of November, 1954, until the time of service for the purpose of appear-

ing as a witness and as the defendant in two lawsuits, namely, Florencio T. Ramirez, Juliana Ramirez and Jesus Ramirez, d/b/a Guam Style Center, vs. Shaheen's of Honolulu, Ltd., formerly George A. Shaheen Co., Ltd.; and Shaheen's of Honolulu, Ltd., v. Florencio T. Ramirez, Juliana Ramirez, and Jesus Ramirez, d/b/a Guam Style Center.

3. That as a party in witness in these suits defendant is immune to service of process in any other action during the period of trial and for a reasonable time thereafter.

4. And for the further reason that the special process server herein appointed, Gregorio Babauta, is an employee of the attorney for the plaintiff herein, being a law clerk in the said Howard D. Porter's office.

5. The defendant further moves the court to quash the notice of taking deposition served upon the defendant herein on the ground that the notice is scheduled to be taken before one V. A. Zafra, chief commissioner, who is an employee of the plaintiff herein.

This motion is based upon the pleadings and files in this case and the attached memorandum of points and authorities.

Dated this 29th day of November, 1954, at Agana, Guam.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant.

[Title of District Court and Cause.]

AFFIDAVIT

Unincorporated Territory of Guam,
Municipality of Agana—ss.

Finton J. Phelan, Jr., being first duly sworn,
deposes and says:

1. That he is an attorney at law, practicing in the City of Agana, unincorporated Territory of Guam, and maintaining offices at Suite 201-203 Mesa Building, First Street West, Agana, Guam. That he has been the attorney for defendant, George A. Shaheen, since on or about the 16th day of July, 1953.

2. That of your affiant's personal knowledge in the past the said George A. Shaheen has not maintained an office or a business within the unincorporated Territory of Guam, and for a period of many months preceding the 14th day of November, 1954, said George A. Shaheen was in the continental United States.

3. That said defendant, George A. Shaheen, is a citizen of the Territory of Hawaii, residing in the City of Honolulu, with his address P. O. Box 3235 in said City.

4. That said George A. Shaheen was to the personal knowledge of your affiant on Guam from the 14th day of November, 1954, until the 23rd day of November, 1954, solely for the purpose of appearing as a witness in two certain lawsuits, namely, Florencio T. Ramirez, Juliana Ramirez, and Jesus

Ramirez, d/b/a Guam Style Center, vs. Shaheen's of Honolulu, Ltd., formerly George A. Shaheen Co., Ltd., and Shaheen's of Honolulu, Ltd., vs. Florencio T. Ramirez, Juliana Ramirez and Jesus Ramirez, d/b/a Guam Style Center, and for no other purpose.

Further your deponent sayeth not.

Dated this 29th day of November, 1954, at Agana, Guam.

/s/ FINTON J. PHELAN, JR.,
Affiant.

Subscribed and sworn to before me this 29th day of November, 1954.

[Seal] /s/ ROLAND A. GILLETTE,
Clerk of the District
Court of Guam.

[Endorsed]: Filed November 29, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION

To Howard D. Porter, Esquire, Attorney for Plaintiff, Attorney General's Office, Government of Guam, Agana, Guam:

Please take notice that the defendant, George A. Shaheen, through his undersigned counsel objects to the taking of his deposition upon oral examination on the 30th day of November, 1954, at 9:00 a.m. at the City of Agana, unincorporated Territory of Guam, before V. A. Zafra, Chief Commissioner, at

the office of said Chief Commissioner, in Agana, Guam, on the following grounds:

1. That a Motion to Dismiss on the ground of lack of jurisdiction of this court over this defendant has been filed this day and as yet has not been heard.

2. On the further ground that said V. A. Zafra, Chief Commissioner, is an employee of the plaintiff herein and is therefore disqualified.

3. And on the further ground that the office of said Chief Commissioner is an office owned and maintained by the plaintiff herein.

This objection will be brought to the attention of the Court at its courtroom, Guam Congress Building, at the City of Agana, unincorporated Territory of Guam, on Friday, the 3rd day of December, 1954, at 9:30 a.m., or at any other time that counsel can be heard.

Dated this 29th day of November, 1954, at Agana, Guam.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant.

Received November 29, 1954.

[Endorsed]: Filed November 29, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION

To Howard D. Porter, Esquire, Attorney for Plaintiff:

Please take notice that the attached Motion to

Dismiss will be brought for hearing before the District Court of Guam in its courtroom, Guam Congress Building, on the 3rd day of December, 1954, at 09:30 a.m. of said day, or as soon thereafter as counsel can be heard.

Dated this 29th day of November, 1954, at Agana, Guam.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant.

Received November 29, 1954.

[Endorsed]: Filed November 29, 1954.

[Title of District Court and Cause.]

AFFIDAVIT

Robert M. Hino, being first duly sworn, deposes and says:

(1) That he is an accountant, employed as auditor for the Department of Finance, Government of Guam.

(2) That your affiant hereby certifies that he has checked the books and records of Fashions, Inc., Agana, Guam, and that said books reflect the following:

(a) An account with Zenith Radio Corporation, 6001 Dickens Avenue, Chicago, Illinois, and the invoices, bills of lading, etc., show that all merchandise from the company is charged to George A. Shaheen, Fashions, Inc., Agana, Guam.

(b) A partial check of this account shows entries as set out in Exhibit "1," attached hereto, and made a part hereof.

(3) The first invoices in this account reflect business in the first part of 1953 and were billed to George A. Shaheen, Guam Style Center.

(4) Some of the payments on this account were made by checks from Fashions, Inc., to George A. Shaheen, personally, and cashed locally.

(5) The records also indicate a personal account with George A. Shaheen with the following entries:

10/31/53	Loan—Cash		\$1,250.00
10/31/53	Trnsf from Slifka a/c		500.00
10/31/53	Royal Mfg. Inv. #5632		605.63
			<hr/>
			\$2,355.63
10/31/53	Pd. G.A.S. by Ck. #500	\$ 64.45	
	a/c Royal		
12/31/53	Pd. G.A.S. by Ck. #624	220.03	284.48
	a/c Slifka		
	Bal. due G. A. Shaheen		\$2,071.15

Further your deponent sayeth not.

Dated this 9th day of December, 1954, at Agana, Guam.

/s/ ROBERT M. HINO.

Subscribed and sworn to before me this 9th day of December, 1954.

[Seal] /s/ J. A. CRISOSTOMO,

Deputy Clerk of the District
Court of Guam.

EXHIBIT "1"

Date	Invoice No.	Amount of Purchase
2/16/54	58290	\$ 35.00
2/24/54	16722	873.79
2/ 3/54	57637	2.37
3/ 9/54	59463	1,092.64
3/12/54	59605	3.80
3/12/54	59609	40.11
4/28/54	16993	878.74
4/29/54	18854	1,059.12
4/ 9/54	60908	63.04
4/29/54	61773	1.00
5/13/54	17069	802.12
5/18/54	19052	1,318.32
5/28/54	62990	59.08
5/28/54	63008	1,059.12
5/20/54	62890	19.63
5/10/54	62172	1,318.32
5/11/54	62228	19.90
6/17/54	63821	33.45
6/14/54	63644	109.24
10/29/54	69528	633.00
10/26/54	17822	858.72
10/20/54	17790	1,803.12

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION OF
MOTION TO DISMISS

Territory of Guam,
Municipality of Agana—ss.

William Renforth, being first duly sworn on oath,
deposes and says:

1. That he is the Chief of Administration of the
Commercial Port of Guam, and that in his official

capacity he is in charge of the records and accounts of the Commercial Port of Guam which show all entries of merchandise, type, quantity and value, imported into Guam, and the consignors and consignees of such merchandise.

2. That the records and accounts of the Commercial Port of Guam contain entries therein reflecting that on the following dates merchandise in the various quantities and values was imported into Guam, of which George A. Shaheen, Agana, Guam, was the final consignee.

Date Entered	Consignor	Items	Declared Value
Nov. 23, 1953	International Expeditors, Inc., A/C Zenith Radio Corp., Chicago, Ill.	Radios and Batteries	\$3,231.56
Dec. 21, 1953	Same	Radios and Batteries	2,872.18
Jan. 21, 1954	Same	Radios	324.00
Jan. 22, 1954	Zenith Radio Corp., Chicago, Ill.	Batteries Dry Cell	183.43
Feb. 26, 1954	Zenith Radio Corp., Chicago, Ill.	Batteries Dry Cell	603.75
Mar. 30, 1954	International Expeditors, Inc., A/C Zenith Radio Corp., Chicago, Ill.	Radios	858.84
Apr. 19, 1954	Zenith Radio Corp.	Dry Batteries	1,027.80
July 6, 1954	Same	Radios and Batteries	2,090.81
Dec. 3, 1954	Same	Radios and Batteries	3,294.84

Dated this 8th day of December, 1954.

/s/ WILLIAM RENFORTH.

Subscribed and sworn to before me this 8th day of December, 1954.

[Seal] /s/ V. U. ZAFRA,

Notary Public, Agana, Guam.

My commission expires January 20, 1955.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION OF
MOTION TO DISMISS

Territory of Guam,
Municipality of Agana—ss.

I, Florencio T. Ramirez, hereby state on oath:

1. I am a co-owner of Guam Style Center, Mong-mong, Guam, and have been co-owner and manager of this company since before January 1, 1948. As manager of the company, at all times herein mentioned, I have been fully cognizant of all of the business affairs of Guam Style Center and its transactions with George A. Shaheen and George A. Shaheen Co., Ltd.

2. Sometime during the month of January, 1948, I executed a contract on behalf of Guam Style Center with George A. Shaheen on behalf of George

A. Shaheen Co. In the negotiations for this contract George A. Shaheen advised us that he was George A. Shaheen Co. Mr. Shaheen and his company became the exclusive purchasing agent for Guam Style Center, and all of the buying was done through George A. Shaheen Co.

In the carrying out of this contract we did the following things:

1. Mr. Shaheen did all of the buying of the Guam Style Center, and charged all of the purchases to George A. Shaheen Co., lending the credit of his company to Guam Style Center.

2. Guam Style Center had to submit a business report each week, and only certain amounts were allowed to be spent before the bills were paid to George A. Shaheen Co.

3. Mr. Shaheen also assisted and advised in the management of the business and advertising and merchandising.

3. We entered into a second contract sometime in the month of September, 1948. This contract was about the same contract as the first one, except the percentage was a little different. This contract was written by Mr. Shaheen in his own handwriting. It was understood, again, that this was a contract between George A. Shaheen Co. and Guam Style Center, and not an individual contract with George A. Shaheen. To carry out this contract we did the same things enumerated above under paragraph 2. This contract was in effect until February, 1950,

and during these two years George A. Shaheen was in Guam for about three months each year working with Guam Style Center in the carrying out this contract. During this time Mr. Shaheen also sold to other stores on the Island from George A. Shaheen Co.

4. On February 1, 1950, Guam Style Center and George A. Shaheen Co., Ltd., entered into a new contract. The main change in this contract was that the credit of Guam Style Center was to be used in addition to the credit of George A. Shaheen Co., Ltd. This contract was executed in the name of the corporation and signed by George A. Shaheen, President. We operated under this contract, and at no time did any person from the corporation object to its terms or attempt to repudiate this contract. During the term of this contract Mr. Shaheen was in Guam from three to four months per year. Mr. Shaheen was still using the credit of his company, advising and assisting in the management of the business, and still checking the finances of the company during this time.

5. We entered the last contract with George A. Shaheen Co. in April, 1952. In this contract the commission was based on sales by Guam Style Center instead of on purchases. This contract was carried out in the same manner as all the previous contracts until we stopped doing business with them in March, 1953.

6. During the time George A. Shaheen was buying for us, he made an arrangement with the Zenith

Corporation of Chicago, Illinois, for Guam Style Center to be the distributor for its products on Guam. We have not been distributors for these products since we stopped doing business with George A. Shaheen Co.

7. During the carrying out of these contracts the Guam Style Center paid the following approximate amounts to George A. Shaheen Co., or George A. Shaheen Co., Ltd., or Shaheen's of Honolulu, Ltd.:

(a) Goods direct from the Shaheen Companies	\$ 500,000.00
(b) Goods bought from other companies through the Shaheen Companies	800,000.00
	<hr/>
	\$1,300,000.00

There were also purchases of approximately \$300,000.00 from other companies that Guam Style Center paid direct and on which there was a 10% commission paid to George A. Shaheen.

8. George A. Shaheen had the privilege of drawing checks on the bank account of Guam Style Center for about one and one-half years, and during this time he wrote approximately \$320,000.00 in checks. Some were for his personal bills and expenses which were charged to his commissions. The majority were to his corporation in Honolulu or other companies for purchases for Guam Style Center.

9. George A. Shaheen kept purchase orders of the corporation with him while he was in Guam and often wrote the purchase orders while in Guam and sent them direct to various vendors in the United States.

Dated this 9th day of December, 1954.

/s/ FLORENCIO T. RAMIREZ.

Subscribed and sworn to before me this 9th day of December, 1954.

[Seal] /s/ JOAQUIN O. AGASA,
Notary Public in and for
the Territory of Guam.

My commission expires 1/22/55.

[Endorsed]: Filed December 9, 1954.

[Title of District Court and Cause.]

ORDER

The defendant's motion to vacate and set aside the return of service issued by the plaintiff herein and served upon the defendant on the 23rd day of November, 1954, having been noticed for hearing and heard on the 10th day of December, 1954, and the court being advised in the premises and after due consideration thereof, it is hereby ordered that the defendant's motion be and it is hereby denied.

Dated December 14th, 1954.

/s/ PAUL D. SHRIVER,
District Judge.

Approved as to Form:

/s/ FINTON J. PHELAN, JR.,

/s/ THAD TISDALE,

Assistant Attorney General, Attorney General's
Office, Agana, Guam.

[Endorsed]: Filed December 14, 1954.

[Title of District Court and Cause.]

ORDER QUASHING MOTION FOR PRODUCTION, INSPECTION AND COPYING OF DOCUMENTS, AND NOTICE OF TAKING DEPOSITION

The defendant's motion to vacate and set aside the motion for production, inspection and copying of documents and the order and notice of the taking of the defendant's deposition, having been duly heard on the 10th day of December, 1954, the court being fully advised in the premises and after due consideration thereof,

It Is Hereby Ordered that the notice of taking of defendant's deposition and the order granting the same entered on the 23rd day of November, 1954, is hereby quashed, and the motion for production, inspection and copying of documents filed on

the 23rd day of November, 1954, is hereby denied. It appearing to the Court that V. A. Zafra, Chief Commissioner, a Notary Public, is, in the meaning of the Rule, an interested party and therefore disqualified as an officer before whom such deposition can be taken.

Dated at Agana, Guam, this 13th day of December, 1954.

/s/ PAUL D. SHRIVER,
Judge of the District
Court of Guam.

Approved as to Form:

.....,
THAD TISDALE,
Assistant Attorney General, Government of Guam,
Agana, Guam.

[Endorsed]: Filed December 17, 1954.

[Title of District Court and Cause.]

**SPECIAL APPEARANCE AND
MOTION TO DISMISS**

The defendant, George A. Shaheen, appearing specially for the purpose of this motion only, moves the court as follows:

I.

To dismiss the complaint on file herein in that it appears upon its face that the complaint shows this

court is without jurisdiction, and that the requisite jurisdictional averments are not contained within the complaint.

II.

To dismiss the complaint on the ground that the United States of America is a necessary party and has not been joined either as a party plaintiff or as a party defendant.

III.

To dismiss the complaint on the ground that neither the Commissioner of Internal Revenue nor the Attorney General of the United States has authorized or directed the commencement of this action.

IV.

To dismiss the complaint on the ground that it fails to state a claim upon which relief can be granted.

V.

To dismiss the complaint on the ground that Chapter 8A, Title 48, USCA, does not contain any grant of jurisdiction in this cause.

VI.

To dismiss the complaint on the ground that the plaintiff seeks to enforce a statute of the United States and such enforcement rights are by statute reserved to the Attorney General of the United States.

VII.

To dismiss the complaint on the ground that the statutes of the United States require the defendant

to report his entire income to the United States Bureau of Internal Revenue and not to the plaintiff.

VIII.

To dismiss the complaint on the ground that the relief sought, if any the plaintiff be entitled to, should be obtained from the United States of America and not from this defendant.

IX.

To dismiss the complaint on the ground that the defendant as a citizen and resident of the Territory of Hawaii is by the provisions of the statutes of the United States exempt from the payment of taxes to the unincorporated territory of Guam, which unincorporated territory is entitled to receive such portion of any taxes so paid to the United States as the Treasury Department of the United States may determine to have been derived from Guam and by the Treasury Department of the United States then pursuant to statute covered into the Treasury of Guam.

X.

To dismiss the complaint in that the plaintiff lacks the capacity to sue under the statutes of the United States.

XI.

To dismiss the complaint on the ground that the defendant is not a citizen or resident of the unincorporated territory of Guam and at the time of service of process was not transacting any business within said unincorporated territory of Guam and

was in the unincorporated territory of Guam solely to defend an action in this court.

XII.

To dismiss the action in that the plaintiff is not entitled to the relief herein prayed for in this jurisdiction in that the complaint fails to show jurisdiction of the court over the defendant.

XIII.

To dismiss the complaint herein on the ground that process and service is insufficient as required by the Federal Rules of Civil Procedure, Rule 4.

XIV.

To dismiss the complaint on the ground that with respect to income tax within the unincorporated territory of Guam there is no such officer as the Commissioner of Revenue and Taxation and therefore no officer of the unincorporated territory of Guam has the authority, power or duty to prepare commissioner's income tax return or to make jeopardy assessments.

XV.

To dismiss the complaint on the ground that the claim is a void and illegal attempt to exact a penalty or tax contrary to the provision of the Constitution upon interstate commerce.

XVI.

To dismiss the complaint on the ground that the conditions precedent to the bringing to this action have not been averred.

XVII.

To dismiss the complaint on the ground that the defendant does not owe any taxes to either the Government of Guam or any of its officers.

XVIII.

To dismiss the complaint on the ground that the District Director of Internal Revenue at Baltimore, Maryland, is the proper official duly authorized by law to collect income taxes within the unincorporated territory of Guam.

XIX.

To dismiss the complaint on the ground that no officer of the territorial government of Guam has been authorized by statute to collect any income tax.

XX.

To dismiss the Second and Third Counts of the Complaint herein on the ground that the provisions of Section 19503 of Chapter XX of the Government Code of Guam have not been complied with and until such compliance no action can be maintained.

XXI.

To dismiss the complaint on the ground that there is a misjoinder of causes of action.

XXII.

To dismiss the complaint on the ground that the venue of this action is improper.

This motion is based upon the pleadings and files in this case, the attached documents and the statutes

of the United States and the Codes of the unincorporated territory of Guam.

/s/ FINTON J. PHELAN, JR.,

Attorney for Defendant,

George A. Shaheen;

/s/ FINTON J. PHELAN, JR.,

For Heen, Kai, Dodge & Lum, Attorneys for Defendant, George A. Shaheen, 206 Hawaiian Trust Building, Honolulu, T. H.

EXHIBIT A

In the District Court of Guam, in and for the
Unincorporated Territory of Guam

Civil No. 73-54

GOVERNMENT OF GUAM,

Plaintiff,

vs.

GEORGE A. SHAHEEN,

Defendant.

AFFIDAVIT

Unincorporated Territory of Guam,
City of Agana—ss.

Finton J. Phelan, Jr., being first duly sworn, deposes and says:

1. That he is an attorney at law, practicing in the City of Agana, unincorporated territory of Guam, and maintaining offices at Suite 201-203

Mesa Building, First Street West, Agana, Guam. That he has been the attorney for defendant, George A. Shaheen, since on or about the 16th day of July, 1953. That he has known the defendant herein, George A. Shaheen, since sometime in the year 1950.

2. That of your affiant's personal knowledge in the past said George A. Shaheen has not maintained an office or place of business within the unincorporated territory of Guam, but was during the entire time that your affiant knew the said George A. Shaheen employed or associated with that certain partnership known as Guam Style Center. That for a period of many months preceding the 1st day of November, 1954, the said George A. Shaheen was absent from Guam and was in the Territory of Hawaii or the continental United States.

3. That said defendant, George A. Shaheen is a citizen and resident of the Territory of Hawaii, maintaining an address at Post Office Box 3235 in said City of Honolulu, Territory of Hawaii.

4. That the said defendant George A. Shaheen was to the personal knowledge of your affiant within the unincorporated territory of Guam from the 14th day of November, 1954, until on or about the 26th day of November, 1954, solely for the purpose of appearing in two certain law suits, namely, Guam Style Center, et al., v. George A. Shaheen, et al., and Shaheen's of Honolulu, Ltd., v. Guam Style Center, et al. That from on or about the 1st day

of April, 1953, until on or about the 1st day of October, 1953, said George A. Shaheen was engaged while within Guam in endeavoring to settle and prepare his defense for said lawsuits.

5. That while within the unincorporated territory of Guam, said George A. Shaheen resided at the Pan Am Hotel as a transient, which hotel has for a considerable period in the past been closed and out of business.

6. That the defendant, George A. Shaheen, whose permanent address is in the City of Honolulu, Territory of Hawaii, and is a man over 70 years of age, and that in the proper defense of this lawsuit numerous files, documents and other evidence, as well as numerous witnesses, would have to be transported to the unincorporated territory of Guam at great expense and cost to the defendant, which cost said defendant is not in a position to defray, and a great number of witnesses would have to be called and for whom there does not exist within the unincorporated territory of Guam adequate and suitable hotel facilities or other housing facilities.

7. That attached hereto are purported notices and demands with respect to an income tax and a business privilege tax for the unincorporated territory of Guam which were dated the 6th day of December, 1954, and the 7th day of December, 1954, and which were forwarded to the defendant, George A. Shaheen, in the City of Honolulu, Territory of Hawaii.

Further your affiant sayeth not.

Dated this 10th day of January, 1955, at Agana, Guam.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant,
George A. Shaheen.

Unincorporated Territory of Guam,
City of Agana—ss.

Finton J. Phelan, Jr., being duly sworn, deposes and says that he has read the above and foregoing instrument and the facts therein stated are true, except to those stated on information and belief and that he believes them to be true.

/s/ FINTON J. PHELAN, JR.,
Affiant.

Subscribed and sworn to before me this 10th day of January, 1955.

[Seal] /s/ E. L. CORYELL,
Notary Public in and for the Unincorporated Territory of Guam.

My commission expires July 27, 1955.

(Copy)

Government of Guam, Agana, Guam

December 6, 1954.

Mr. George A. Shaheen,
c/o Pan American Hotel,
Agana, Guam, M. I.

Dear Sir:

Under date of November 23, 1954, this office pursuant to Section 3612 of the Internal Revenue Code of 1939, made determinations of your income tax liability and prepared income tax returns on your behalf for the calendar years ending December 31, 1951, 1952, 1953. Your 1954 taxable year was terminated on October 31, 1954, and a return likewise prepared for you for the period January 1, 1954, to October 31, 1954.

A jeopardy assessment of the amounts so determined has been made under Section 273(a) and Section 6961(a) of the Internal Revenue Code of 1939 and 1954, respectively. A summary of the tax, penalty and interest so computed follows:

Year	Tax Deficiency	50% Fraud Penalty	Interest	Total
1951	\$15,640.00	\$ 7,820.00	\$ 2,346.00	\$25,806.00
1952	16,968.00	8,484.00	1,696.80	27,148.80
1953	16,968.00	8,484.00	678.66	26,130.66
1954	4,002.00	2,001.00	325.17	6,328.17
	<hr/>	<hr/>	<hr/>	<hr/>
	\$53,578.00	\$26,789.00	\$ 5,046.63	\$85,413.63

Notice and demand is herewith made for immediate payment of the above-listed taxes, penalties and interest.

Very truly yours,

HARRY L. MANGERICH,
Commissioner of Revenue and
Taxation.

jcm

(Copy)

Government of Guam, Agana, Guam

December 7, 1954.

Mr. George A. Shaheen,
Agana, Guam.

Dear Sir:

Information available to this office indicates that you are or have been engaged in a business activity in Guam. The "gross receipt" derived from such activity are taxable under the provisions of Chapter 6, Title XX of the Government Code of Guam.

The records of this office disclose that you have not registered to do business in Guam, and that no tax return have been filed or tax paid as required by law.

	1/1/51	8/1/53
	thru	thru
	7/31/53	4/30/54
Estimated Tax	\$1,808.33	\$ 491.67
Penalty	90.42	300.85
Interest	-0-	28.18
	<hr/>	<hr/>
Total tax due		\$2,719.45

Your attention is invited to the appellate procedures contained in Section 19,504 and 19,506 of the Business Privilege Tax Law if the taxpayer feels aggrieved by the assessment of this office.

Very truly yours,

HARRY L. MANGERICH,
Commissioner of Revenue and
Taxation;

By /s/ M. A. CHACO,
Internal Revenue Officer.

Enclosure

(Copy)

Duplicate
InvoiceDepartment of Finance
Government of Guam

Acct. #2076

No. 009756-CT

George A. Shaheen

Date: November 23, 1954.

Forward from previous statement

500-11 Grt sales & rentals

Calendar Year 1951

(Service-Comm.)\$ 700.00

Calendar Year 1952

(Service-Comm.) 700.00

January to July, 1953

(Service-Comm.) 408.33

500-13 Penalty 90.42

Total\$1,898.75

(Copy)

Duplicate
InvoiceDepartment of Finance
Government of Guam

Acct. #2076

No. 009757-CT

re

George A. Shaheen

Date: November 23, 1954.

Forward from previous statement

500-11 Grt sales & rentals

August to December, 1953

(Service-Comm.)\$ 291.67

January to April, 1954

(Service-Comm.) 200.00

500-13 Penalty (Sec. 19514.01) 55.00

Penalty (Sec. 19514.03) 245.85

Interest 28.18

Total\$ 820.70

[Endorsed]: Filed January 10, 1955.

[Title of District Court and Cause.]

MOTION FOR CHANGE OF VENUE ON
THE GROUND OF CONVENIENCE OF
PARTIES AND WITNESSES IN THE IN-
TEREST OF JUSTICE

In the alternative, and only in the event that defendant's motion to dismiss the complaint is denied, then the defendant moves the court as follows:

I.

To issue an order transferring the above-entitled cause to the United States District Court in and for the Territory of Hawaii, on the ground that such transfer is for the convenience of the parties and witnesses as more clearly appears in the affidavit of Finton J. Phelan, Jr., hereto annexed as Exhibit A.

Dated this 10th day of January, 1955.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant,
George A. Shaheen;

/s/ FINTON J. PHELAN, JR.,
For Heen, Kai, Dodge & Lum, Attorneys for De-
fendant, George A. Shaheen, 206 Hawaiian
Trust Building, Honolulu, T. H.

[Endorsed]: Filed January 10, 1955.

[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE STATEMENT
AND MOTION TO STRIKE

Motion for More Definite Statement

In the alternative, and only in the event that defendant George A. Shaheen's motion to dismiss the complaint is denied and the motion for change of venue should thereafter be denied, defendant, George A. Shaheen, moves the Court as follows:

I.

That the complaint is so vague and ambiguous that defendant should not reasonably be required to prepare a responsive pleading and defendant George A. Shaheen, therefore moves that plaintiff be ordered to furnish a more definite statement of the nature of its claim, as set forth, in the following respects:

1. In Paragraph 2 of the first count to set forth in detail the nature of the business that defendant has been carrying on, his place of business and the person or persons with whom said business was conducted.

2. In Paragraph 4 of the first count to set forth the source of the data therein enumerated, when any assessments were made and by whom, when any demands were made and by whom, the basis for the alleged fraud penalty, and the act or acts upon which the plaintiff relies to show fraud; the name of the Commissioner and the statutory authority

upon which he bases his claim to office and the manner and means of his appointment to such office.

3. In the second paragraph of Count Two to set forth the nature of the business in which it is alleged the defendant was engaged and the sections of Bill No. 3, Eighth Guam Congress, and its amendments, now Chapter 6, Title XX, Government Code of Guam, which, with respect to that business, if any, require this defendant to file returns or to pay any tax.

4. In the third paragraph of Count Two to set forth the source of the figures of income of this defendant.

5. In the second paragraph of Count Three to set forth the nature of the business in which it is alleged the defendant was engaged and the sections of Bill No. 3, Eighth Guam Congress, and its amendments, now Chapter 6, Title XX, Government Code of Guam, which, with respect to that business, if any, require this defendant to file returns or to pay any tax.

6. In the third paragraph of Count Three to set forth the source of the figures of income of this defendant.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant,
George A. Shaheen.

/s/ FINTON J. PHELAN, JR.,
For Heen, Kai, Dodge & Lum, Attorneys for Defendant, George A. Shaheen, 206 Hawaiian Trust Building, Honolulu, T. H.

Motion to Strike

In the alternative, and only in the event that defendant's motion to dismiss the complaint is denied, and thereafter the motion for change of venue and motion for more definite statement be denied, then defendant, George A. Shaheen, moves the court to strike Count Two and Count Three of the complaint on the ground that they fail to show that the defendant was engaged in any pursuit, the following of which rendered him liable to pay any tax to the Government of Guam.

To strike from Count One the allegations of fraud and a fraud penalty on the ground that the provisions of the Federal Rules of Civil Procedure have not been complied with.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant,
George A. Shaheen.

/s/ FINTON J. PHELAN, JR.,
For Heen, Kai, Dodge and Lum, Attorneys for Defendant, George A. Shaheen, 206 Hawaiian Trust Building, Honolulu, T. H.

[Endorsed]: Filed January 10, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION

To Howard D. Porter, Attorney General of Guam,
Attorney for Plaintiff, Government of Guam.

Please take notice that the undersigned will bring the attached Motion to Dismiss, Motion for Change of Venue, Motion for More Definite Statement and Motion to Strike, on for hearing before the District Court of Guam at its courtroom, Guam Congress Building, City of Agana, unincorporated territory of Guam, on the 21st day of January, 1955, at 09:30 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard.

Dated this 10th day of January, 1955, at the City of Agana, unincorporated territory of Guam.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant,
George A. Shaheen.

/s/ FINTON J. PHELAN, JR.,
For Heen, Kai, Dodge and Lum, Attorneys for Defendant, George A. Shaheen, 206 Hawaiian Trust Building, Honolulu, T. H.

Receipt of copy acknowledged.

[Endorsed]: Filed January 10, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that George A. Shaheen, the defendant herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the opinion and final order of the District Court of Guam assuming jurisdiction of this action, entered on the 21st day of January, 1955.

Dated at Agana, Guam, this 31st day of January, 1955.

/s/ FINTON J. PHELAN, JR.,
Attorney for Defendant;

/s/ FINTON J. PHELAN, JR.,
For Heen, Kai, Dodge and Lum, Attorneys for Defendant, 206 Hawaiian Trust Building, Honolulu, T. H.

Receipt of copy acknowledged.

[Endorsed]: Filed January 31, 1955.

District Court of Guam,
Territory of Guam

Civil Case No. 73-54

GOVERNMENT OF GUAM,

Plaintiff,

vs.

GEORGE A. SHAHEEN,

Defendant.

Before: The Honorable Paul D. Shriver, Judge.

HEARING ON MOTIONS
TRANSCRIPT OF PROCEEDINGS

January 21, 1955
Agana, Guam

Appearances:

For the Plaintiff:

THAD TISDALE,
Deputy Island Attorney,
Government of Guam.

For the Defendant:

FINTON J. PHELAN, JR.,
Attorney-at-Law,
Agana, Guam.

The Court: First order of business?

The Clerk: The matter of the Government of Guam vs. George A. Shaheen coming on for hearing on motions.

Mr. Phelan: If it please the Court, I believe the motions speak for themselves.

The Court: Now which motion do we have before us this morning?

Mr. Phelan: We have a motion to dismiss, a motion for a change of venue and, if I am not mistaken, a motion to strike.

The Court: Motion to dismiss will be denied. Now what is your next motion?

Mr. Phelan: The next is a motion for change of venue, if it please the Court.

The Court: The motion for change of venue will be denied.

Mr. Phelan: The next is a motion for a more definite statement.

Mr. Tisdale: I believe that is combined with your motion to strike, isn't it, Mr. Phelan?

Mr. Phelan: Yes, but they are set up separately.

The Court: What is your view as to this motion for a more definite statement?

Mr. Tisdale: The motion for a more definite statement and motion to strike are successive motions under Rule 12 which are specifically barred by 12(g) and 12(h). Neither of those motions come within the exception of 12(g) or 12(h) and are barred, sir. Rule 12 calls for and states specifically

that all motions under Rule 12 must be made at one time and if not so done, under 12(g) and 12(h) they are waived.

The Court: What was the first motion?

Mr. Tisdale: I beg your pardon, sir?

The Court: What was the first motion?

Mr. Tisdale: The first motion was the motion filed on the 29th of November which was made under Rule 12(b)(2) and (4).

The Court: And your motion for more definite statement?

Mr. Tisdale: Was not included.

The Court: Filed on January 10. The November motion went to what?

Mr. Tisdale: It went to—I think it was a motion to quash and also, I think, went to alleged defect in service. I think the motion was under lack of jurisdiction over the person and insufficiency of process. That is 12(b)(2) and (b)(4).

The Court: Those motions went to the jurisdiction of the Court?

Mr. Tisdale: They are specifically included under Rule 12(b), if the Court please, and the construction of the rule states that all of them shall be included.

The Court: Was a motion going to jurisdiction made at any time?

Mr. Tisdale: Jurisdiction of the subject matter, if it please the Court, not jurisdiction of the person; jurisdiction of the person can be waived.

The Court: Oh, it can be waived?

Mr. Tisdale: Also as to all of those motions there are many cases holding that under the present

rule it is not necessary to make separate motions, and this rule provides you may plead both to the jurisdiction to the person and defenses to the merits of the case without waiving your objection to the jurisdiction of the person. In the cases recited in our response, may it please the court, we have quoted several with regard to this specific point. I may call the court's attention to the first paragraph of the quotation on page 3 of the government's response. It is specifically in point.

The Court: Now Rule 12(b) specifically, of course, provides that prior to any responsive pleading, the following defenses may be made by motion: Lack of jurisdiction over the subject matter, lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, failure to state a claim upon which relief can be granted, failure to join an indispensable party. Now as you recall, the original motion was in support of the motion that upon the ground that the defendant, George A. Shaheen, was under the protection of the Court at the time that he was served, and did I not in overruling that, state that in view of the fact he had done other business, give the defendant a certain amount of time in which to answer or otherwise plead?

Mr. Tisdale: I believe it was a certain amount of time to answer; I am not certain. However, may it please the Court, in the motion was also brought up the question of insufficiency of process, not only the matter of serving the defendant while he was under the protection of the Court but the matter

of process itself. I believe it was objected to specifically because the process that was served was either by Gregorio Babauta of the Island Attorney's office or the one that the policeman served, and his objection to sufficiency of process was also a motion under 12(b).

The Court: Well, the original motion went, of course, to the jurisdiction. Now it seems to me it is obviously foolish to require a defendant to move to the merits of the case at the same time he is moving to the jurisdiction.

Mr. Tisdale: May it please the Court, that is the purpose, as I understand it, of Rule 12, that it has abolished your distinction between general and special appearances, and your general rules concerning waiver of defects, and states specifically "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required." It is our construction of Rule 12, which the cases we have cited here we believe hold, that it is mandatory upon the defense now under Rule 12 that they plead not only their objections to the jurisdiction of the Court of the person, but they also combine in that motion all of their other objections. We believe that is the holding in the three cases cited and in particular—

The Court: The minutes of the court show that the Court gave the defendant 30 days in which to answer. Consequently all the motions will be denied

since the defendant has not answered. He will be given ten days in which to answer. I think it is substantially correct that all motions must be filed at the same time since, of course, the obvious purpose of the rule is to expedite the arriving at issues, but since we have definitely ordered 30 days in which to answer or otherwise plead, I feel that is discretionary with the Court, giving the party an opportunity to move to the pleadings, so all motions will be denied and the defendant will be given ten days in which to answer.

District Court of Guam,
Territory of Guam—ss.

I, Dorothy L. Wilkins, Official Court Reporter for the District Court of Guam, hereby certify the above and foregoing to be a true and correct transcript of the stenographic shorthand notes taken in the above-numbered case at the said time and place as set forth.

/s/ DORTHY L. WILKINS,
Official Court Reporter.

[Endorsed]: Filed March 29, 1955, D. C. of Guam.

[Endorsed]: Filed April 4, 1955, U.S.C.A.

Civ-73-54

GOVERNMENT OF GUAM,

vs.

GEORGE A. SHAHEEN.

MINUTES

11/23/54—Plaintiff having filed a Motion for Production, Inspection, and copying of Documents. Ordered hearing on said motion be had on Friday, December 3, 1954, at 9:30 a.m.

11/29/54—It appearing that the plaintiff filed on November 23, 1954, a Notice of Taking Deposition of defendant on November 30, 1954, and that on this day the defendant filed a Notice of Motion for hearing of objections to taking of Deposition on said day. Ordered hearing on said motion to object be had on Friday, December 3, 1954, at 9:30 a.m. It further appearing that the defendant on this day has filed a special appearance and Motion to Dismiss, Ordered that said motion be heard on Friday, December 3, 1954, at 9:30 a.m.

12/3/54—Hearing: Government appears by Louis A. Otto, Jr., and Richard Rosenberry, Deputy Island Attorneys. Defendant appears by Finton J. Phelan, Jr., his attorney. By agreement between parties, Ordered hearing on motions continued to Friday, December 10, 1954, at 9:30 a.m.

12/10/54—Hearing: Government appears by Thad Tisdale and Richard Rosenberry, Deputy Island Attorneys. Defendant appears by Finton J. Phelan,

Jr., his attorney. Having heard the arguments of the attorneys for the respective parties, Ordered defendant's Motion to Dismiss denied and defendant must plead. Attorney for defendant given thirty (30) days in which to answer. Court further finds that the Chief Commissioner of Guam is not a disinterested party to an action of this kind brought by the Government of Guam, therefore, Notice of Taking of Deposition and Deposition Subpoena are quashed. Attorneys for plaintiff to prepare Order and submit same to the Court, on defendant's Motion to Dismiss. Attorney for the defendant to prepare Order on Notice of Taking of Deposition and Deposition Subpoena and submit same to the Court.

1/10/55—Special Appearance and Motion to Dismiss, Motion for Change of Venue, etc., Motion for More Definite Statement and Motion to Strike, and Notice of Motion having been filed this date, Ordered hearing on the motions set for Friday, January 21, 1955, at 9:30 a.m.

1/21/55—Hearing: Government appears by Thad Tisdale, Deputy Island Attorney. Defendant appears by Finton J. Phelan, Jr., his attorney. Having heard the arguments of the attorneys for the respective parties, Ordered all motions denied. Defendant given ten (10) days in which to answer.

Attest: A True Copy.

[Seal] /s/ ROLAND A. GILLETTE,
Clerk, District Court of
Guam, Territory of Guam.

Case No. 73-54

COPY OF DOCKET ENTRIES

11/23/54:

1. Filed Complaint.
2. Filed appointment of special process server—Gregorio S. Babauta. Issued summons & 1 copy & 1 copy of Complaint to sp. proc. server.
3. Filed Mtn for an Ord for leave to take Deposition of deft.
4. Filed affid in suppt of Mtn to take deposition.
5. Filed Order of Court granting motion to take deposition of deft.
6. Filed Notice of tak of Dep of deft on Nov. 30.
7. Filed Motion for Production, Inspection and copying of documents.
8. Filed Notice of Mtn. Hearing Dec. 3, 9:30.

11/24/54:

9. Filed summons with Affidavit of service attached thereto.

11/29/54:

10. Filed Notice of Mtn re objection of tak of Dep of deft. Hng Dec. 3.
11. Filed sp appr & Mtn to Diss.
12. Filed Affid in suppt of Mtn to Diss—Phelan.
13. Filed Memo in suppt of Mtn to Diss.
14. Filed Notice of Motion re Dissl. Hng set for Dec. 3.

12/3/54:

Hng: Attys present by Agree hng on mtns cont Dec. 10.

12/9/54:

15. Filed affidavit of V. U. Zafra.

16. Filed govt's Memo in opposition to mtn of deft.

12/10/54:

17. Filed cert of service of pltf's Memo in opposition. Hng: Attys present. Arguments had. Deft's Mtn to Diss denied. Deft's Mtn in opp to tak of Dep sustained. Notice & Subpoena quashed. Deft prop serv & must plead. Deft given 30 days to ans. Deft to draw Ord.

12/14/54:

18. Fld Ct Ord denying Deft's Mtn to Dis.

12/17/54:

19. Fld Ord Quashing Mtn for Production, Inspection & Copying of Documents, etc.

1/10/55:

20. Fld Spc Appearance and Mtn to Diss.

21. Fld Mtn for Change of Venue, etc.

22. Fld Mtn for More Definite Statement and Mtn to Strike.

23. Fld Notice of Mtn. Hrng on Mtns Jan. 21.

1/20/55:

24. Fld govt's Response (Memo in opposition).

25. Fld Cert of Service of Response.

1/21/55:

Hng: Attys present. Arguments had. Ord all motions denied. Deft given 10 to ans.

1/31/55:

26. Fld Notice of Appeal.

27. Fld Bond for Costs on Appeal.

3/9/55:

28. Fld Statements of Points on Appeal.

29. Fld Designation of Contents of Record on Appeal.

Attest: A True Copy.

[Seal] /s/ ROLAND A. GILLETTE,
Clerk, District Court of Guam,
Territory of Guam.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Roland A. Gillette, Clerk of the District Court of Guam for the Territory of Guam, M. I., do hereby certify that the following documents, to wit:

1. Complaint, filed November 23, 1954.
2. Appointment of Special Process Server, filed November 23, 1954.
3. Motion to take Deposition of defendant, filed November 23, 1954.
4. Affidavit of Harry L. Mangerich in support of Motion, filed November 23, 1954.
5. Order authorizing taking of deposition of defendant, filed November 23, 1954.
6. Notice of taking of deposition, filed November 23, 1954.

7. Motion for production, inspection and copying of documents, filed November 23, 1954.

8. Notice of Motion, filed November 23, 1954.

9. Summons issued November 23, 1954, with attached affidavit of service of summons and Complaint and various other documents, filed November 24, 1954.

10. Notice of Motion regarding taking of depositions, filed November 29, 1954.

11. Motion to Dismiss, filed November 29, 1954.

12. Affidavit of Finton J. Phelan, Jr., in support of Motion to Dismiss, filed November 29, 1954.

13. Memorandum of Points and Authorities in support of Motion to Dismiss, filed November 29, 1954.

14. Notice of Motion on Motion to Dismiss, filed November 29, 1954.

15. Memorandum of Plaintiff in opposition to Motion, with affidavits of Robert M. Hino, William Renforth and Florencio T. Ramirez attached, filed December 9, 1954.

16. Order denying defendant's motion to vacate service of summons, filed December 14, 1954.

17. Order quashing motion for production, inspection and copying of documents and notice of taking deposition, filed December 17, 1954.

18. Special appearance and Motion to Dismiss, filed January 10, 1955.

19. Motion for Change of Venue, filed January 10, 1955.

20. Motion for More Definite Statement and Motion to Strike, filed January 10, 1955.

21. Notice of Motions, filed January 10, 1955.

22. Memorandum of Plaintiff in opposition to Special Appearance and Motion to Dismiss, Motion for Change of Venue, Motion for More Definite Statement and Motion to Strike, filed January 20, 1955.

23. Notice of Appeal, filed January 31, 1955.

24. Bond for Costs on Appeal, filed January 31, 1955.

25. Statement of Points on Appeal, filed March 9, 1955.

26. Designation of Contents of Record on Appeal, filed March 9, 1955.

27. Certified copy of Clerk's Minutes.

28. Certified copy of Docket Entries.

are the original or certified copies of the original documents filed in the office of the clerk in the above-entitled case.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of the aforesaid court at Agana, Guam, M. I., this 9th day of March, A.D. 1955.

[Seal] /s/ ROLAND A. GILLETTE,
Clerk of the Court.

[Endorsed]: No. 14690. United States Court of Appeals for the Ninth Circuit. George A. Shaheen, Appellant, vs. Government of Guam, Appellee. Transcript of Record. Appeal from the District Court of Guam, Territory of Guam.

Filed March 12, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14690

GEORGE A. SHAHEEN,

Appellant,

vs.

GOVERNMENT OF GUAM,

Appellee.

STATEMENT OF POINTS ON APPEAL

The points upon which Appellant will rely on appeal are:

The Court erred in the following particulars:

1. In failing to dismiss the complaint on the ground that the defendant is not a citizen or resident of the unincorporated territory of Guam and at the time of service of process was not transacting any business within said unincorporated territory of Guam and was in the unincorporated territory of Guam solely to defend an action in the District Court of Guam.

2. In failing to dismiss the second and third counts in the complaint on the grounds that the provisions of Section 19503 of Chapter XX of the Government Code of Guam had not been complied with and that absent such compliance no action can be maintained.

3. In failing to dismiss the complaint on the ground that neither the Commissioner of Internal

Revenue or the Attorney General of the United States had authorized or directed the commencement of the action.

4. In failing to dismiss the complaint on the ground that the District Director of Internal Revenue at Baltimore, Maryland, is the proper officer duly authorized by law to collect income taxes within the unincorporated territory of Guam.

5. In failing to dismiss the complaint on the ground that no officer of the Territorial Government of Guam has been authorized by Statute to collect any income tax.

6. In failing to dismiss the complaint on the ground that with respect to income tax within the unincorporated territory of Guam there is no such officer as the Commissioner of Revenue and Taxation, and further that no officer of the unincorporated territory of Guam has the authority, power or duty to prepare Commissioner's income tax returns or to make jeopardy assessments.

7. In failing to dismiss the complaint on the ground that the defendant is a citizen and resident of the Territory of Hawaii, which by the Statutes of the United States exempt him from the payment of taxes to the unincorporated territory of Guam, which unincorporated territory is entitled to receive such portion of any taxes so paid to the United States as the Treasury Department of the United States may determine to have been derived from Guam and by the Treasury Department of the

United States than pursuant to Statute covered into the treasury of Guam.

8. In failing to dismiss the complaint on the ground that it failed to state a claim upon which relief can be granted (Section 259, Title 26, U.S.C.A.).

Dated at Agana, unincorporated Territory of Guam, this 29th day of March, 1955.

/s/ FINTON J. PHELAN, JR.,
Attorney for Appellant;

/s/ FINTON J. PHELAN, JR.,
For Heen, Kai, Dodge & Lum, 206 Hawaiian
Trust Building, Honolulu, T. H., Attorneys for
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 4, 1955.

